UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Catalina Yachts, Inc.,	)	**Docket No. EPCRA-09-94-0015**
	)	
Respondent	)	

O R D E R

The Regional Hearing Clerk's letter, dated February 27, 1997 informing the parties of the availability of the transcript is considered the starting date for the running of the 45-day period by which findings of fact and conclusions of law are due. The parties shall file their proposed findings of fact and conclusions of law on or before April 14, 1997. Reply briefs shall be filed on or before May 14, 1997.

Dated this 4th day of March 1997.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER**, dated March 4, 1997, in re: Catalina Yachts, Inc., Dkt. No. EPCRA-09-94-0015, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: March 4, 1997

ADDRESSEES:

Robert D. Wyatt, Esq.
Eileen M. Nottoli, Esq.
Beveridge & Diamond
One Sansome Street, Suite 3400
San Francisco, CA 94104

David M. Jones, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Reg. IX
75 Hawthorne Street
San Francisco, CA 94105

Mr. Steven Armsey
Regional Hearing Clerk
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

LAW OFFICES
BEVERIDGE & DIAMOND
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION
SUITE 3400
ONE SANSOME STREET
SAN FRANCISCO, CA 94104-4438
(415) 397-0100

TELECOPIER (415) 397-4238

EILEEN M. NOTTOLI
DIRECT DIAL NUMBER
(415) 983-7714

BEVERIDGE & DIAMOND, P. C.
SUITE 700
1350 I STREET, N. W.
WASHINGTON, D. C. 20005-3311
(202) 789-6000

40TH FLOOR
437 MADISON AVENUE
NEW YORK, N. Y. 10022-7380
(212) 702-5400

BEVERIDGE & DIAMOND
ONE BRIDGE PLAZA
FORT LEE, N. J. 07024-7502
(201) 585-8162

February 13, 1997

VIA FEDERAL EXPRESS

Judge Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, S.W., Room 3706 (A-110)
Washington, D.C. 20460

Re : In re: Catalina Yachts, Inc.
Docket 09-94-0015

Dear Judge Nissen:

Please be advised that we received a copy of the hearing transcript on Monday, February 10, 1997. Beacuse this was the first notification that the transcript was available, we understand that our closing argument is due 45 days from then or March 27, 1997.

Sincerely,

Eileen Nottoli

Eileen M. Nottoli

EMN:dh
Enclosure
cc: Steven Armsey, Regional Hearing Clerk
David M. Jones, Esq., EPA Region IX
Gerald Douglas
James L. Meeder, Esq.

S:\CLI\14\00\3433\LTR\3433EMN.21

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In re:	Docket No. EPCRA-09-94-0015
CATALINA YACHTS, INC.,	**POST HEARING BRIEF**
Respondent.	

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND BRIEF

I. INTRODUCTION.

This proceeding concerns a civil administrative enforcement action for penalties brought under the authority of Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. §§ 11001 et seq. (also known as the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA") and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22. The action was initiated by the Director, Air and Toxics Division, United States Environmental Protection Agency, Region 9 (EPA), through a Complaint and Notice of Opportunity for Hearing (Complaint) filed with the Regional Hearing Clerk, Region 9 on June 20, 1994, against Catalina Yachts, Inc. ("Respondent") whose place of business is located at 21200 Victory Boulevard, Woodland Hills,

CA 91364 (hereinafter "Facility").

In the Complaint, Complainant, EPA, charged Respondent with the violation of EPCRA in seven separate counts. Counts I and II charge Respondent with failure to submit a Form R covering the usage of acetone for the years 1988 and 1989 in violation of Section 313 of EPCRA [42 U.S.C. § 11023] and 40 C.F.R. Part 372. Counts III through VII charge Respondent with failure to submit a Form R covering usage of styrene for the years 1988, 1989, 1990, 1991 and 1992, also in violation of Section 313 of EPCRA and 40 C.F.R. Part 372.

Respondent's Answer To Civil Complaint ("Answer") was filed with the Regional Hearing Clerk, Region 9, on July 14, 1994. In the introductory paragraph of the Answer Respondent admitted that it is a "person", an "owner or operator" of the Facility, the SIC for the Facility is 3732 and that there are ten or more "full-time employees" at the Facility. The introductory paragraph concludes with a general denial which reads as follows:

> Respondent is continuing to review its records and is at the present time unable to respond to the remaining allegations in . . . the Complaint and, therefore, denies each and every remaining allegation. Respondent reserves the right to amend its Answer when it completes its review.

Respondent's response to each of the seven counts which follows, is a denial based on the review of its records. There is no indication that Respondent has ever completed "its review" of the records.

On October 4, 1994, EPA filed a Motion for Accelerated Decision as to liability based on EPA's contention that there

were no material issues of fact to be decided at a hearing. In due course Respondent filed their opposition to Respondent's motion requesting the trier of fact to either dismiss the action, determine liability with no civil penalty or set a hearing to determine an appropriate civil penalty.

By his order dated January 10, 1995, the Presiding Administrative Law Judge granted Complainant's motion for accelerated decision as to liability and set the stage for a hearing on the issue of a civil penalty.

II. PROPOSED FINDINGS OF FACT.

1. The Complainant by delegation from the Administrator of the United States Environmental Protection Agency and the Regional Administrator, EPA, is the Director of the Air and Toxics Division, EPA. Complaint p.1

2. The Respondent is Catalina Yachts, Inc. a boat building company. Complaint ¶ 1;

3. Catalina Yachts, Inc. is a California corporation.

4. The Respondent is a person as defined by Section 329(7) of EPCRA. Complaint ¶ 5;

5 The Respondent is an owner or operator of a facility as defined by Section 329(4) OF EPCRA which is located at 21200 Victory Boulevard, Woodland Hills, CA 91364. Complaint ¶ 7;

6. The Facility employs ten or more full-time employees as defined by 40 C.F.R. § 372.3. Complaint ¶ 8;

7. The Facility is classified in Standard Industrial Classification 3732. Complaint ¶ 9;

8. An authorized EPA representative inspected the Facility on November 15, 1993. Complaint ¶ 6;

9. The November 15, 1993, inspection of the Facility revealed that in calendar year 1988 and 1989 Respondent otherwise used acetone CAS No. 67-64-1 in excess of 10,000 pounds. Complaint ¶s 13 and 18;

10. Acetone is a toxic chemical listed under 40 C.F.R. § 372.65. Complaint ¶s 13 and 18;

11. Respondent failed to submit a Form R for calendar years 1988 and 1989, respectively, for acetone to the Administrator, U.S. Environmental Protection Agency and to the State of California, by July 1 of 1989 and 1990. Complaint ¶s 14 and 19;

12. The November 15, 1993, inspection of the Facility revealed that in calendar year 1988 Respondent processed styrene, CAS No. 100-42-5, in excess of 50,000 pounds. Complaint ¶ 23;

13. The November 15, 1993, inspection of the Facility revealed that in calendar years 1989, 1990, 1991 and 1992, Respondent processed styrene, CAS No. 100-42-5 in excess of 25,000 pounds. Complaint ¶s 28, 33, 38 and 43;

14. Styrene is a toxic chemical listed under 40 C.F.R. § 372.65. Complaint ¶s 23, 28, 33, 38 and 43;

15. Respondent failed to submit a Form R for calendar years 1988, 1989, 1990, 1991 and 1992, respectively, for styrene to the Administrator, U.S. Environmental Protection Agency and to the State of California, by July 1 of 1989, 1990, 1991, 1992 and 1993. Complaint ¶s 24, 29, 34, 39 and 44;

16. The Order Granting Motion For Accelerated Decision As To Liability dated January 10, 1995, established that Respondent has violated EPCRA as alleged in the Complaint and that the only issue remaining for hearing is the amount of the civil penalty to be assessed.

17. Respondent had annual sales of approximately $38 million at the time that the Complaint was filed.

18. Respondent had more than fifty employees at the time that the Complaint was filed.

19. The proposed civil penalty set forth in the Complaint was calculated in accordance with the August 10, 1992, Enforcement Response Policy for Section 313 and Section 6607 of the Pollution Prevention Act (1990)(hereinafter "ERP").

20. In calculation of the civil penalty in this matter, EPA took into account the nature, circumstances, extent and gravity of the violation(s) and, with respect to the violator, annual gross sales, number of employees, quantity of chemicals processed (styrenne) or otherwise used (acetone).

21. The purpose of the ERP is to ensure that the U.S. Environmental Protection Agency takes appropriate enforcement actions in a fair and consistent manner as well as to ensure that the enforcement response is appropriate for the violation.

22. In calendar years 1988 and 1989, Respondent used more than ten times the 10,000 pound threshold for otherwise use of acetone.

23. Respondent submitted the Form Rs to EPA for calendar years

1988 and 1989, for acetone greater than one year after July 1, 1989 and July 1, 1990, respectively.

24. In calendar year 1988, Respondent processed more than ten times the 50,000 pound threshold for styrene.

25. In calendar year 1989, 1990, 1991 and 1992, Respondent processed more than ten times the 25,000 pound threshold for styrene.

26. Respondent submitted the Form R to EPA for calendar year 1988, for styrene greater than one year after July 1, 1989.

27. Respondent submitted the Form R to EPA for calendar year 1989, for styrene greater than one year after July 1, 1990.

28. Respondent submitted the Form R to EPA for calendar year 1990, for styrene greater than one year after July 1, 1991.

29. Respondent submitted the Form R to EPA for calendar year 1991, for styrene greater than one year after July 1, 1992.

30. Respondent submitted the Form R to EPA for calendar year 1992, for styrene greater than one year after July 1, 1993.

31. Respondent is currently in compliance with Section 313 of EPCRA.

32. Respondent submitted the appropriate forms for acetone and styrene to the State of California for 1988, 1989, 1990, 1991 and 1992.

33. Respondent does not have a history of past violations of Section 313 of EPCRA.

34. Region 9 has conducted outreach workshops under Section 313 of EPCRA. Notice of the workshops is mailed to companies that

may be required to report under EPCRA. Respondent was on the mailing list for these mailings at least in 1987 and 1993.

35. Information contained in the toxic chemical release inventory is used by both EPA and local communities for purposes of emergency planning and pollution prevention planning.

36. Acetone was delisted effective June 16, 1995.

III. PROPOSED CONCLUSIONS OF LAW.

1. Respondent's failure to submit a Form R for acetone for 1988 by July 1, 1989, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

2. Respondent's failure to submit a Form R for 1989 for acetone by July 1, 1990, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

3. Respondent's failure to submit a Form R for 1988 for Styrene by July 1, 1989, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

4. Respondent's failure to submit a Form R for 1989 for Styrene by July 1, 1990, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

5. Respondent's failure to submit a Form R for 1990 for Styrene by July 1, 1991, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

6. Respondent's failure to submit a Form R for 1991 for Styrene by July 1, 1992, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

7. Respondent's failure to submit a Form R for 1992 for Styrene

by July 1, 1993, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

8. A penalty of one hundred sixty-two thousand five hundred dollars, the proposed penalty set forth in the Complaint after allowance for the delisting of acetone, is appropriate for the violations of EPCRA alleged in the Complaint based upon the nature, extent and circumstances of the violations.

IV. THE PROPOSED PENALTY IS CONSISTENT WITH THE INTENT AND PURPOSE OF EPCRA.

a. The Purpose of EPCRA is to Keep Communities Informed About Toxic Chemical Releases.

The purpose of Section 313 of EPCRA reporting is to gather information on the releases of certain chemicals to the environment and to make that information available to the public. *In re: Riverside Furniture Corp.* (1989)[1], Docket No. EPCRA-88-H-VI-406S, p.10; 40 C.F.R. § 372.1. The chemical release information collected through the Form Rs is compiled and published annually in the Toxic Chemical Release Inventory. The integrity and value of the Toxic Chemical Release Inventory is entirely dependent on accurate and timely reports submitted by the regulated community. Riverside Furniture, at 10 - 11. "[T]he filing of such reports was intended, in this as in other programs, to be timely, complete and accurate. The success of

---

[1] At the time that *Riverside Furniture* was filed and decided the Enforcement Response Policy For Section 313 of the Emergency Planning and Community Right to Know Act also known as Title III of the Superfund Amendments and Reauthorization Act (SARA) dated December 2, 1988, was in place. *Riverside*, p.4n.1.

EPCRA can be attained only through voluntary, strict and comprehensive compliance with the Act and regulations which recognize that achievement of such compliance would be difficult and that a lack of compliance would weaken, if not defeat, the purposes expressed." *Riverside Furniture*, at 10.

Over 300[2] chemicals and chemical compounds are subject to reporting. These are among the most common substances in industry. Many of the chemicals are acutely toxic, others are chronic toxins or carcinogens. All of the chemicals on the list have some associated adverse health or environmental effect. Some are specifically implicated in causing depletion of the earth's ozone layer.

The Toxic Chemical Release Inventory is the only source of information pertaining to the chemicals reported which has been specifically mandated by the Congress to be directly accessible to the public. The information resides in a publicly accessible computerized data base and is also made available to the public through press releases by EPA, national reports and reports provided by EPA to the states and communities throughout the nation. Data from the Inventory is also available in many cities in public libraries.

The Toxic Chemical Release Inventory is used by EPA and local communities for emergency planning and pollution prevention

---

[2] At the time that Respondent's Form Rs that are the subject of the Complaint were due, 40 C.F.R. § 372.65 required reporting on over 300 chemicals and chemical categories. The list was expanded in 1994.

planning. EPA uses this information to influence the direction of environmental programs and to regulate the amount of toxic chemicals that may be released to the environment. Other programs such as the Pollution Prevention Initiative, use the Inventory to highlight priority industries where toxic and carcinogenic chemicals are being released and to identify individual facilities within a given industry that have particularly high or particularly low releases of specific chemicals.

The regulatory scheme of EPCRA reflects Congressional concern that accurate information on both accidental and non-accidental releases of toxic chemicals should be available to the community, to states and to the Federal government. Although the concern about the hazardous chemicals used by neighborhood companies was heightened by the 1984 chemical tragedy in Bhopal, India, where a release of toxic gas killed and injured thousands of people, Congress was concerned as well about the insidious effects of routine releases of toxic chemicals that are not immediately life-threatening. In an effort to address these concerns, Congress passed EPCRA in 1986 to help communities within the United States to deal safely and effectively with the many hazardous substances that are used throughout our society.

In discussing the concept of such a reporting requirement during a Senate debate on an early version of the provision, Senator Robert T. Stafford of Vermont stated:

> The intent behind this amendment is to require manufacturing facilities handling substantial quantities of toxic

> chemicals to report the annual quantities of these chemicals they dump into the environment. These reports when compiled will constitute an inventory which tells us where the toxic chemicals are and where they are being released into the the environment. Such an inventory will be a valuable tool for environmental regulators, for the health professionals, the concerned public and the companies themselves.
>
> ****
>
> After the Bhopal disaster and the continuing litany of chemical accidents in this country, the public wants to know and the public has a right to know about the releases of toxic chemicals, deliberate releases that occur every day as well as accidental releases. This amendment, Mr. President, will provide that information. 131 Cong.Rec. S11772 (daily ed. Sept. 19, 1985) (Statement of Sen. Stafford).

During that Senate debate, Senator Frank R. Lautenberg of New Jersey addressed the way in which the information collected by such report would be used:

> This inventory is to be used by State and Federal agencies to improve toxic chemical management by monitoring use and tracking releases of these substances. An effective inventory will help us better understand the flow of toxics into the environment and thereby aid in the preventing future Superfund sites. It will also provide critical information to Federal and State air, water and hazardous waste programs to track compliance and enforcement efforts within these programs . . . .[S]uch information can help inform and direct research efforts. Finally, Mr. President, the inventory will provide the Government and the public with information about daily and routine exposure to toxics in our environment--something essential to protecting the public health. 131 Cong.Rec. S11776 (daily ed. Sept. 19, 1985) (Statement of Sen. Lautenberg).

Likewise, during the House debate over an early version of the reporting requirements, Representative Gerry Sikorski of Minnesota recognized the need for such information, stating:

> We know that the vast majority of dangerous exposure to hazardous chemicals is through long-term, routine or regular releases, not the dramatic Bhopal kind of incidents. The effect of exposure to these chemicals is not discernible overnight . . . .

****

> The millions of Americans in thousands of neighborhoods, your neighborhoods, exposed to toxic chemicals, your constituents and your neighborhoods have a fundamental right to know about the hazardous chemicals, acute and chronic, that are released into the environment hour after hour, day after day, year after year. They have a right to know where the strange odors are coming from. They have a right to know what toxic chemicals are mixed in the soil their kids play on and they have a right to know what poisonous chemicals are contaminating their drinking water. 131 Cong. Reg. H11204-5 (daily ed. Dec. 6, 1985) (Statement of Rep. Sikorski).

Respondent in this case should be assessed a substantial penalty because its failure to timely file Form Rs goes to the heart of the purpose of EPCRA--the community's right to know about releases of toxic chemicals.

b. EPA Considered the Statutory Factors in Proposing the Civil Penalty.

1. Factors Related to the Violation.

The applicable statutory factors are found in Section 16 of the Toxics Substances Control Act (TSCA), as amended[3] [15 U.S.C. § 2615] which draws a distinct demarcatin between factors relating to the violation itself and factors relating to the violator. For the violation itself, Section 16 of TSCA provides that in determining the amount of the civil penalty EPA must take into account the "nature, circumstances, extent and gravity of

---

[3] With respect to civil penalties under EPCRA, Section 325 of EPCRA [42 U.S.C. § 11045] provides in part:

> Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15. 42 U.S.C. § 11045(b)(2).

the violation or violations." [15 U.S.C. § 2615(a)(2)(B)]. The meaning of each of these terms will be explored in turn.

The commonly understood meaning of "nature" is the most appropriate interpretation. Webster's New World Dictionary defines nature as "[t]he essential character of a thing; quality or qualities that make something what it is; essence . . ." . As EPA noted in its 1980 TSCA penalty policy, "the nature (essential character) of a violation is best defined by the set of requirements violated." 45 Fed.Reg. 59770, 59771.

In this case, the nature of the EPCRA violation was the Respondent's failure to provide timely, complete and accurate information to EPA and the State of California as required by Section 313 of EPCRA [42 U.S.C. § 11023] Respondent filed each of the Form Rs required by the statute over one year after the date that the same were due. Respondent's failure to provide the information in a timely manner deprived the public of information on the use and releases of chemicals in the community and, consequently, could result in increased risk to the local community and thereby deprives both individuals and government organizations of the opportunity to take steps to reduce the risks posed by these releases.

"Circumstances" is reasonably interpreted in the context of the TSCA penalty assessment factors as reflecting the probability of harm occurring as a rsult of the violation. See 45 Fed. Reg. 59770, 59772. Under Section 313 of EPCRA the circumstances of the violations "takes into account the seriousness of the

violation as it relates to the accuracy and availability of the information to the community, to the State of California and to the Federal government." ERP, p.8. The circumstances of the violations in this case is the failure to report in a timely manner. This is the most significant of the violations of Section 313. Failure to report is classified as the most serious violation of Section 313 of EPCRA because such failure deprives the public of information on chemical releases which may have a significant affect on public health and the environment.

The natural meaning of the term "extent" suggests a consideraton of the degree, range or scope of a violatin. In the context of Section 313 of EPCRA, EPA interprets this "extent" to take into consideration the quantity of a listed toxic chemical a facility processes, manufactures or otherwise uses. Facilities that process, manufacture or otherwise use ten or more times the reporting threshold for the Section 313 chemicals create a greater potential of exposure to the employees at the facility, the public and the environment. The amount of toxic chemicals processed, manufactured or otherwise used should be considered in assessing a penalty under EPCRA because the major goal and intent of EPCRA is to make available to the general public, on an annual basis, a reasonable estimate of the toxic chemicals emitted into their local communities from regulated sources. ERP, p.9.

Another factor in determining the extent of the violation is size of the respondent business. The size of the respondent business reflects the proposition that a smaller penalty will

have the same deterrent effect on a small company, as a large penalty on a larger company. Respondent has more than 50 employees and at the time the Complaint was filed had annual sales in excess of $38 million.

The commonsense meaning of "gravity" in the context of penalty assessment is the overall seriousness of a violation. In both the TSCA and the ERP, EPA interprets "gravity" as a composite of other factors. For violations of Section 313 of EPCRA it is reasonable to view gravity as incorporating the considerations under the extent and circumstances elements of the violations.

2. Statutory Adjustment Factors That Relate To The Violator.

In the paragraphs under the heading above, consideration was given to factors related to the violation. Section 16 of TSCA also requires the consideration of factors pertaining to the violator. These factors include: "Ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other factors as justice may require." [15 U.S.C. § 2615(a)(2)(B)]

No evidence has been presented to date with respect to Respondent's ability to pay the proposed civil penalty or that payment of the proposed civil penalty would in any way impair Respondent's ability to continue in the boat building business. Respondent does not have any history of prior violations of EPCRA.

EPCRA has been determined to be a strict liability statute;

thus, culpability is considered only when there is evidence that Respondent knowingly violated EPCRA. *Riverside Furniture*, Interlocutory Order Granting Complainant's Motion For Partial Accelerated Decision, p.5,n.2. (Intent is not an element of an EPCRA civil violations); see also ERP, p.14 ("Lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA . . . ."). There is no evidence that Respondent's violations were knowing or willful. Although EPA considered the statutory factors of Respondent's ability to pay, effect on ability to continue to do business and culpability, in the case at bar, no adjustment was made based upon these factors because they were determined by EPA as not being applicable to Respondent.

The final factor under the statutory considerations is other factors as justice may require. It is the general practice at EPA to apply this factor during settlement negotiations. Once a case proceeds to hearing Complainant seeks the proposed civil penalty in the Complaint without consideration of this broad category. Complainant believes that their position in regard to the subject factor is consistent with Section 313 of EPCRA because Section 313 of EPCRA requires reporting whenever a member of the regulated community has manufactured, processed or otherwise used a chemical that is subject to the statute in quantities which exceed the reporting threshold.

3. EPA Also Considered The Adjustment Factors In The ERP.

In addition to the statutory factors, in assessing a penalty

EPA also considers it appropriate to weigh several additional adjustment factors under the ERP. These are: voluntary disclosure; delisted chemicals; attitude; and, supplemental environmental projects. ERP, p.8.

The first adjustment factor, voluntary disclosure is not applicable to the case at bar because the violations were discovered as a result of an inspection. ERP, p.14.

The attitude adjustment factor with its two components was not applied in this case because of Complainant's practice of limiting application of the factor to settlement discussions. The supplemental environmental project adjustment, like the attitude adjustment is also limited in its application by Complainant to settlement discussions.

The adjustment factor for delisted chemicals is applicable in this case. Acetone was delisted effective June 16, 1995, and the fixed reduction from the ERP has been applied in this document.

c. The ERP Ensures That Enforcement Actions Are Fair, Uniform and Consistent.

> The Agency has issued penalty policies to create a framework whereby the decisionmaker can apply his[Sic] discretion to the statutorily-prescribed penalty facts, thus facilitating the uniform application of these factors.

In re: Mobil Oil Corp.(1994), EPCRA Appeal No. 94-2, p.30.

The ERP sets forth a comprehensive, rational and reasonable framework for applying each of the statutory factors to the facts of a case and places each type of violation in context with the other types of violations. The policy is designed to promote deterrence, fair and equitable treatment of the regulated

community and swift resolution of environmental problems.

Consistency is a fundamental element of fairness in administrative adjudications, and EPA's enforcement program is credible only to the extent that penalties are assessed in a consistent manner. The use of the ERP ensures that EPCRA enforcement will be consistent nationally.

Another important consideration in assessing penalties is deterring violations: The penalty must be high enough to deter the person charged with violating EPCRA, and other members of the regulated community from repeating the violation.

The ERP is based on the statutory criteria set forth above, with the determination of a gravity-based penalty based on the nature, extent, circumstances and gravity of the violations as set forth in a penalty matrix. Once the gravity-based penalty is determined, upward or downward adjustments may be made to the determined amount based on statutory factors of culpability, history of prior violations, ability to continue in business and such other factors as justice may require and factors that are incorporated into the ERP such as voluntary disclosure, delisted chemicals, attitude and supplemental environmental projects. ERP, p.8. These adjustments are carefully balanced to assure that mitigating or aggravating factors appropriately influence the amount of the penalty, yet do no change the penalty disproportionately relative to other comparable violations.

The total penalty is determined by calculating the penalty for each violation on a per chemical, per year, per facility

basis. ERP, p.13. This approach ensures that the public will obtain information about each and every chemical subject to EPCRA. The Trier of Fact is required to consider the ERP in assessing a penalty. 40 C.F.R. § 22.27(b); *Riverside Furniture*, p.5.

The proposed penalty set forth in the Complaint is rationally related to the harm in this case, consistent with penalties in other cases with similar fact patterns and not arbitrary and capricious.

V. PENALTY REDUCTION SHOULD NOT BE BASED UPON RESPONDENT'S ARGUMENTS THAT THE VIOLATION WAS UNINTENTIONAL OR THAT RESPONDENT COMPLIED WITH OTHER ENVIRONMENTAL LAWS.

a. Respondent Is Charged With Knowledge Of The Law.

Respondent's argument that the penalty should be reduced because Respondent was not aware of EPCRA at the Facility and that its violation of EPCRA was unintentional is without merit because Respondent is charged with knowledge of the law and should have been aware of the requirements of EPCRA.

It is well settled law that all persons are charged with knowledge of United States codes as well as regulations and rules promulgated thereunder and published in the Federal Register. 44 U.S.C. § 1507; *Federal Crop Ins. v. Merrill*, (1947), 332 U.S. 380, 384-385; *T.H. Agriculture and Nutrition Co.* (1984), TSCA VII-83-T-191, p.11; *Colonial Processing, Inc.* (1991), Docket No. II EPCRA-89-0114, pp. 20-21; *Riverside Furniture*, p.5.

Further, the fact that Respondent was unaware of EPCRA does

not provide a basis to reduce a penalty. Apex Microtechnology (1993), Docket No. EPCRA-09-92-00-07. EPCRA was enacted into law in 1986. Since that time EPA has conducted workshops as EPCRA outreach. Notice of the workshops was mailed out to companies that may be required to report under EPCRA. Respondent was on the mailing list for these mailing at least in 1987 and 1993.

Based upon the outreach programs by Region 9, Respondent should have known the requirements of EPCRA. *Riverside Furniture*, p.7. (The success of outreach programs is predicated on what the respondent should have known as a result of outreach efforts.) "The failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law." *Riverside Furniture, p.7,n.2.*

In addition, public policy requires that a penalty not be reduced on the basis of a respondent claiming to be ignorant of the law. Such reductions would encourage ignorance of the law and should be avoided. This is especially true with regard to Respondent whose place of business is located in a suburban Los Angeles community. Los Angeles County is a major metropolitan area providing immediate communications with the world on every level.

Therefore, no penalty reduction should be made on the basis of Respondent's lack of knowledge of EPCRA.

b. Compliance With Other Environmental Laws Does Not Support A Reduction In Penalty.

Respondent has argued that the penalty should be reduced in this matter based on Respondent filing reports with the State of

California agencies on the use of resins containing styrene, the use of acetone and emissions resulting from such use. In support of these claims Respondent has submitted to Complainant copies of documents submitted to the Los Angeles City Fire Department on a one time basis and documents submitted to South Coast Air Quality Management District covering their emissions data for 1988 and 1989. According to Respondent the forms submitted to the Fire Department and the Air Quality Management District provided similar information as that required on Form Rs under EPCRA.

Section 313 of EPCRA requires the submission of data that is chemical specific. The information submitted on the Form Rs includes releases to air (fugitive and stack), water and land, and treatment on site and transfer off site.

The information submitted by Respondent prior to the inspection which brought about this enforcement action, as shown by Exhibits B, C, D and E to Respondent's Prehearing Exchange shows total yearly quantity on a material basis not per chemical (Exhibits B, C, D and E). Annual emissions are reported for total organic chemicals (Exhibits C, D and E). The information submitted by Respondent in lieu of the Form Rs does not contain the information that is to be reported under Section 313 of EPCRA.

Compliance with other environmental laws does not relieve Respondent of its obligation to comply with EPCRA, nor does it provide a basis for reduction or mitigation of the penalty. *In re: Apex Microtechnology, Inc.* (1993), Docket No. EPCRA-09-92-

00-07, pp. 5-6; *In re: Pacific Refining Co.* (1994), EPCRA Appeal No. 94-1, pp. 18-19 and n.19.

In *Apex*, respondent submitted reports to an air district providing information regarding annual usage of the same chemicals that it was required to report on under EPCRA. *Apex*, p.5. Apex argued, as Respondent here, that although it did not file its Form Rs, but that it did in fact disclose the equivalent information. *Apex*, p.6. The tribunal rejected the argument and held that "there is no basis in the ERP to support a reduction or mitigation of the penalty because other reports were filed with local authorities." *Apex*, p.14. see also *Pacific Refining Co*, p.19 and n.19.

Further, Section 313 of EPCRA requires that Respondent provide the information to EPA, not the State of California or its agencies or local government. see e.g. *Pacific Refining Co.*,pp. 18-19. Congress recognized that EPCRA would collect information that might have already been reported under other environmental laws, but passed EPCRA so that the information would be comprehensive and easy to access. In the debate on the bill, Senator Lautenberg stated: "The information maybe scattered in air files, water files, and on RCRA manifest forms, for example, but not pulled together in one place to provide a complete usable picture of total environmental exposure." 131 Cong.Rec. S11776 (daily ed. Sept. 19, 1985) (statement of Sen. Lautenberg).

Thus, no reduction in the penalty should be made based upon

the fact that Respondent filed emission reports with the State of California.

VI. CONCLUSION. Based on the foregoing, it is respectfully requested that an Initial Decision issue in favor of Complainant and that a penalty of ONE HUNDRED SIXTY-TWO THOUSAND FIVE HUNDRED DOLLARS be assessed against the Respondent.

Dated: May 3, 1996.

Respectfully submitted,

_____

Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Post Hearing Brief was filed with the Regional Hearing Clerk, Region 9 and that a copy was sent by First Class Mail to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, Room 3706 (1900)
Washington, D. C. 20460

and to:

Robert D. Wyatt, Esquire
Eileen M. Nottoli, Esquire
BEVERIDGE & DIAMOND
One Sansome Street, Suite 3400
San Francisco, California 94105

Date

Office of Regional Counsel
U. S. Environmental Protection
Agency, Region 9

2ND OPINION of Level 1 printed in FULL format.

In the Matter of Apex Microtechnology, Inc.

Docket No. EPCRA-09-92-00-07

United States Environmental Protection Agency

1993 EPCRA LEXIS 79

May 7, 1993

HEADNOTE:
[*1] EPCRA: Section 325: Pursuant to Section 325 of EPCRA, 42 U.S.C. @ 11045, a civil penalty in the amount of $ 6,339.90 is assessed for the violation of Section 313, 42 U.S.C. @ 11023 previously found herein.

PANEL:
Henry B. Frazier, III, Chief Administrative Law Judge

COUNSEL:
Ann H. Lyons, Assistant Regional Counsel, U.S. Environmental Protection Agency, Region IX, for the complainant.

Peter G. Schmerl, for the Respondent.

INITIAL DECISION

I. Background - Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision

On November 5, 1992, an Interlocutory Order for Partial Accelerated Decision (Partial Accelerated Decision) was issued in this case. That Order, issued on motion of the U.S. Environmental Protection Agency (EPA, Complainant, or the Agency), found that Apex Microtechnology, Inc. (Respondent, Apex), had violated Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) [a.k.a. Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA)], 42 U.S.C. @ 11023 and the regulations promulgated pursuant thereto, 40 C.F.R. Part 372, as alleged in Counts I and II in the complaint. More particularly, it was found that Respondent [*2] failed to submit to EPA and/or to the State of Arizona, by July 1, 1990 and July 1, 1991, Forms R for the chemical Freon 113 which Respondent used at its facility during calendar years 1989 and 1990 in excess of the established threshold level for reporting such chemical.

II. Background - Processing of the Case and Hearing

On February 2, 1993, a hearing, which had been requested by Respondent, was held in Tucson, Arizona, for the purpose of deciding the sole remaining issue of the amount, if any, of the civil penalty which appropriately should be assessed for the two violations previously found.

In the complaint EPA had proposed a Class II administrative penalty of $ 17,000 for each of the two violations of Section 313 found for a total penalty of $ 34,000. With its prehearing exchange, Complainant submitted a revised proposed civil penalty. The revised proposed penalty was based on the Enforcement Response Policy (ERP) for Section 313 of the Emergency Planning

and Community Right-to-Know Act that was issued by EPA on August 10, 1992. The revised proposed civil penalty based on the August 10, 1992, ERP was $ 9,057, which includes a proposed penalty of $ 5,000 for Count I (failure [*3] to submit by July 1, 1990 the 1989 report) and $ 4,057 for Count II (failure to submit by July 1, 1991 the 1990 report). At the hearing Complainant contended that the $ 9,057 penalty was appropriate; Respondent contended that the proposed penalty was unfair and unreasonable and should be abated or reduced to a nominal amount.

Following the hearing, Complainant and Respondent submitted proposed findings of fact and conclusions of law together with supporting briefs and proposed orders on April 1, 1993, and March 31, 1993, respectively. Reply briefs were filed by Respondent on April 15, 1993 and by Complainant on April 16, 1993.

II. Findings of Fact

In addition to the findings of fact previously made in my Partial Accelerated Decision, and incorporated by reference to the extent not otherwise inconsistent with the findings of fact herein, on the basis of the entire record, including the testimony elicited at the hearing, the exhibits received in evidence and the submissions of the parties, and giving such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, I make the findings of fact which follow. Each matter of controversy [*4] has been determined upon a preponderance of the evidence. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

1. An unannounced EPA inspection of Apex was conducted on March 17, 1992. (Tr. 36-37, 49.)

2. Following the inspection, Apex personnel compiled the required information and prepared Forms R for Freon 113 usage in 1989 and 1990. The forms were signed on March 31, 1992 and were received by EPA on April 6, 1992. (Tr. 12, 43-45.)

3. The Form R for 1989 was due on July 1, 1990; therefore, Apex's Form R for 1989 was more than one year late. (Tr. 16-17; Complainant's Exhibit (Compl. Exh.) 3.)

4. The Form R for 1990 was due on July 1, 1991; therefore, Apex's Form R for 1990 was less than one year late. (Tr. 16-17; Compl. Exh. 3.)

5. Respondent was unaware of the requirement to file a Form R until the EPA inspection was conducted. EPA had not contacted Respondent regarding Form R reporting requirements prior to that time. (Tr. 62-64, 66, 68.)

6. The number of Apex employees which had been reported to Dun [*5] and Bradstreet as of April 1992 was 110. Apex has 125 employees in 1993. (Tr. 16, 61; Compl. Exh. 3.)

7. The gross annual sales of Apex which had been reported to Dun and Bradstreet as of April 1992 were approximately $ 6.5 million. The gross sales of Apex for 1991 was about $ 8.0 million and for 1992, about $ 7.2 million. (Tr. 16, 61; Compl. Exh. 3.)

8. There is no evidence of a history of prior violations of EPCRA by Apex. (Tr. 4, 18.)

9. Respondent had filed reports with the Pima County Air Quality Control District in 1989 and 1991 providing information concerning the annual usage of Freon 113. In contrast to a Form R report, these reports showed the usage in gallons rather than pounds and the reporting periods were from May to June rather than from January through December. (Tr. 52-53; Respondent's Exhibits (Resp. Exhs.) 2, 3.)

10. Respondent was cooperative and responsive during the EPA inspection. (Tr. 43-44; 49-51.)

11. The filing of the required Forms R by Respondent following the inspection was speedy and completely in compliance with EPCRA. (Tr. 44-45, 51-52, 69.)

III. Contentions of the Parties

Complainant contends that Respondent's liability has [*6] been established, and Respondent has not claimed that it is financially unable to pay the proposed penalty. Complainant asserts that it has presented testimony and evidence demonstrating that it correctly and appropriately determined a civil penalty of $ 9,057 and requests an order directing Respondent to pay the proposed penalty.

Respondent admits that it failed to file timely Forms R as required by EPCRA, but maintains that it did, in fact, disclose the equivalent information by filing with Pima County, Arizona, local forms which contained information like that required by Forms R.

Respondent argues that because Complainant has not taken into account all mitigating factors provided for in the ERP and because Respondent, by filing nonconforming forms with the county, met the spirit and intent of Section 313 disclosure requirements, the recommended penalty proposed by Complainant should be abated.

Complainant counters by insisting that Respondent has not provided any defense to the penalty and that the only evidence presented by Respondent was that it had filed some forms with the county environmental agency. Complainant contends that this is not relevant to calculating an appropriate [*7] penalty. There is no discussion in either Section 325 of EPCRA or the ERP of reducing penalties because the violator happens to have complied with other environmental laws.

Although Respondent's witnesses testified that they were unaware of the reporting requirements under Section 313 of EPCRA, Complainant asserts that EPCRA is a strict liability statute, and ignorance of the law is no basis for a defense to the penalty.

Finally, Complainant maintains that EPA's failure to provide Respondent with actual notice of Section 313's filing requirements is not a defense or a basis for reducing the penalty. EPA engages in outreach and attempts to inform companies of their legal requirements through publications, trade associations, seminars and workshops. But not every company will receive this information,

despite the agency's best efforts, and it would severely undermine the EPA's ability to deter future violations of EPCRA to reduce the penalty against Respondent on this basis.

IV. Assessment of Penalty

The Consolidated Rules of Practice provide, in pertinent part, at 40 C.F.R. @ 22.27(b):

(b) Amount of Civil Penalty. If the Presiding Officer determines that a violation [*8] has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

Turning first to the statute, n1 Section 325(c) (1) of EPCRA governs the assessment of civil and administrative penalties for violations of the Section 313 reporting requirements. It permits the Administrator to assess a civil penalty of not more than $ 25,000 per violation. Section 325(c) (3) provides that each day a violation continues constitutes a separate violation for purposes of Section 325(c).

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -

n1 This discussion of the statutory provisions is taken from my initial decision In the Matter of Pease and Curren, Inc., EPCRA-I-90-1008 (March [*9] 13, 1991) slip op. at 9-12.

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - - -

Section 325(c) of EPCRA does not expressly provide criteria to be considered in assessing a penalty for a violation of the reporting requirements of Section 313. However, Section 325(b) sets forth the criteria which must be considered in assessing penalties for violations of the emergency notification requirements under Section 304.

Section 325(b) establishes two types of administrative penalties which may be assessed for a violation of the emergency notification requirements of Section 304 of EPCRA: Class I administrative penalties and Class II administrative penalties. n2

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -

n2 Section 325, 42 U.S.C. @ 11045, provides, in pertinent part:

(b) Civil, administrative and criminal penalties for emergency notification

(1) Class I administrative penalty

(A) A civil penalty of not more than $ 25,000 per violation may be assessed by the Administrator in the case of a violation of the requirements of section

11004 of this title.

* * *

(C) In determining the amount of any penalty assessed pursuant to [*10] this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

(2) Class II administrative penalty

A civil penalty of not more than $ 25,000 per day for each day during which the violation continues may be assessed by the Administrator in the case of a violation of the requirements of section 11004 of this title. . . . Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15.

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - -

Section 325(b)(2) of EPCRA, 42 U.S.C. @ 11045(b)(2), which provides for Class II administrative penalties, requires that civil penalties be assessed in the same manner and subject to the same provisions, as civil penalties are assessed under Section 2615 of Title 15. Section [*11] 2615 of Title 15 governs the assessment of penalties under the Toxic Substances Control Act (TSCA). Section 2615(a)(2)(B) of Title 15 provides that in "determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." (Section 16(a)(2)(B) of TSCA.)

In contrast, Section 325(b)(1)(C) prescribes the following criteria for determining the amount of a Class I penalty: "the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." Thus, the only differences between the criteria which must be considered in assessing Class I and Class II civil penalties under Section 325(b) of EPCRA are that (1) the effect on the ability of the violator to continue [*12] to do business be taken into account for a Class II penalty but not for a Class I penalty, and (2) the economic benefit or savings (if any) resulting from the violation be taken into account for a Class I penalty but not for a Class II penalty.

Since EPCRA itself is silent as to the criteria which should be applied in assessing civil penalties under Section 325(c), the question is whether reference should be made to either or both sets of criteria which are utilized under Section 325(b). The legislative history of EPCRA fails to provide any guidance. It would appear that by setting only a maximum penalty of $ 25,000 for each violation of Section 313, Congress did intend that the penalties which are assessed under Section 325(c) be subject to some degree of discretion. Since Section 304, like Section 313, establishes reporting and notification

requirements, it appears reasonable to conclude that the criteria utilized in assessing penalties under Section 325(b) for violations of Section 304, although not binding, could serve as general guidelines for assessing penalties under Section 325(c) for violations of Section 313.

The penalties in this case are being assessed by an order [*13] made on the record after opportunity for hearing in accordance with Section 554 of the Administrative Procedure Act (APA). Because of the cross-reference to Section 2615 of TSCA found in Section 325(b) (2), Class II penalties for violations of Section 304 of EPCRA are also assessed by an order made on the record after opportunity for a hearing in accordance with Section 554 of the APA. (This is in contrast to Class I penalties which are assessed by EPA through less formal administrative procedures.) Therefore, it would appear reasonable to rely upon the criteria spelled out in Section 2615(a)(2)(B) of TSCA.

The ERP n3 establishes a system for determining penalties in civil administrative actions brought pursuant to Section 313 of EPCRA. A penalty is determined in two stages: (1) determination of a "gravity-based penalty" and (2) adjustments to the gravity-based penalty.

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -n3
Supra, at 3.

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - -

To determine the gravity-based penalty, the "circumstances" of the violation and the "extent" of the violation are considered.

The [*14] circumstance levels of the penalty matrix take into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to states, and to the Federal government. Circumstance levels for failure to report in a timely manner are based upon the "category" of the failure. Form R reports that are submitted one year or more after the July 1 due date are classified as category I, and Form R reports that are submitted after the July 1 due date but before July 1 of the following year are classified as category II. A circumstance level one penalty will be assessed against a category I violation. A "per day" formula is used to determine category II penalties. Therefore, according to the ERP the circumstance level for Count I in this case is "level 1" and for Count II is "level 4" with a "per day" formula to be applied.

The extent level of a violation is based on the number of employees and the gross sales at the time the civil administrative complaint is issued in determining the extent level of a violation. Since Apex used less than ten times the threshold amount n4 of Freon 113 and had less than $ 10 million in total corporate [*15] entity sales and more than 50 employees, the extent level is classified as "level C."

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -n4
Interlocutory Order for Partial Accelerated Decision (November 5, 1992) at 4-5.

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - -

To determine the gravity-based penalty, both the circumstance level and the extent level factors are incorporated into a matrix which establishes the

appropriate gravity-based penalty amount except for those penalties which are calculated on a per day basis.

For Count I the penalty matrix yields a $ 5,000 penalty. For Count II the per day formula yields the following:

$ 1,000 + (280 - 1) ($ 5,000 - $ 1,000) / 365 = Penalty

$ 1,000 + 279 X $ 4,000 / 365 = Penalty

$ 1,000 + $ 1,116,000 / 365 = Penalty

$ 1,000 + $ 3,057 = $ 4,057

Thus, the gravity based penalty for Count II would be $ 4,057.

Having determined the gravity based penalties for Counts I and II, I turn now to the adjustment factors which may be applied to calculate the final penalty. The adjustment factors are:

Voluntary Disclosure

History of prior violation(s)

Delisted chemicals

Attitude [*16]

Other Factors as Justice May Require

Supplemental Environmental Projects

Ability to Pay

There was no voluntary disclosure by Respondent of the violations. The violations were discovered during the inspection; consequently, no adjustment is appropriate. There is no history of prior violations of EPCRA and, hence, no adjustment is appropriate for this factor. (Downward adjustments under this factor are not permitted.) It was not alleged nor was it established that Freon 113 was a delisted chemical and, therefore, no adjustment is called for.

I find that an adjustment in the gravity based penalty is appropriate for Respondent's attitude. The ERP provides that an adjustment of up to 15% may be made for Respondent's cooperation with EPA throughout the "compliance evaluation/enforcement process" and that an additional reduction of up to 15% may be made in consideration of the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance.

Based upon the testimony of EPA's case developer that Respondent had been cooperative and responsive during the EPA inspection and that Respondent was speedy and complete in its compliance [*17] with EPCRA's reporting requirement following the inspection, n5 I conclude that a 15% reduction is appropriate for each of the two components of attitude: cooperation and compliance. In so concluding, I reject Complainant's contention that the attitude adjustment factor may be considered only during settlement

negotiations and may be applied only if Respondent agrees to a settlement without a hearing. Such a restriction would prevent its consideration by the Administrative Law Judge following a hearing. I find no basis in the ERP for such a position.

- - - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - - -n5

Supra, at 5. (Findings of Fact 10 and 11.)

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - -

There are no grounds upon which an adjustment can be justified under other factors as justice may require. Apex has not offered to make expenditures for supplemental environmental projects, nor has Apex raised inability to pay as a defense in this matter.

There is no basis in the ERP to support a reduction or mitigation of the penalty because other reports were filed with local authorities. Such filings do not constitute [*18] the filing of "invalid Forms R." Clearly Respondent failed to provide EPA with the inventory and disclosure information required by EPCRA. Although Respondent's witnesses testified that Apex was unaware of the reporting requirements under Section 313 of EPCRA, that does not provide a basis upon which to reduce the penalty. Respondent, like everyone else, is charged with knowledge of the United States Code and rules and regulations duly promulgated thereunder. n6 Moreover, Respondent was legally obligated to submit the required Forms R by their due dates regardless of whether it had received any information concerning the EPCRA reporting requirements through EPA's "outreach" efforts. Respondent's arguments seem to constitute a plaintive plea by a relatively small business concerning the burdens of similar reporting requirements imposed by different agencies and levels of government and of the difficulties in trying to become informed as to what those requirements are. Such a plea must be presented in forums other than this adjudicatory proceeding under the Administrative Procedure Act.

- - - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - - -n6

44 U.S.C. [*19] @ 1507. The Supreme Court has said: "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-385 (1947).

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - -

Therefore, the final penalty calculation is:

Gravity Based Penalty Count I:	$ 5,000.00
Gravity Based Penalty Count II:	$ 4,057.00
Total Gravity Based Penalty:	$ 9,057.00
Adjustment Factor	X .30
Adjustment Amount	$ 2,717.10
	$ 9,057.00
	- 2,717.10
Final Penalty Amount	$ 6,339.90

ORDER n7

- - - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - - -

n7 Pursuant to 40 C.F.R. @ 22.27(c), this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after the service upon the parties unless an appeal to the Environmental Appeals Board is taken by a party or the Environmental Appeals Board elects to review the initial decision upon its own motion. 40 C.F.R. @ 22.30 sets forth the procedures for [*20] appeal from this initial decision.

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - - -

Pursuant to Section 325 of EPCRA, 42 U.S.C. @ 11045, a civil penalty in the amount of $ 6,339.90 is assessed against Respondent, Apex Microtechnology, Inc., for the violations of Section 313 of EPCRA.

IT IS ORDERED that Respondent, Apex Microtechnology, Inc., pay a civil penalty to the United States in the sum of $ 6,339.90. Payment shall be made by cashier's or certified check payable to "Treasurer, United States of America." The check shall be sent to:

EPA - Region 9, (Regional Hearing Clerk), P.O. Box 360863M, Pittsburgh, PA 15251

Respondent shall note on the check the docket number specified on the first page of this initial decision. At the time of payment, Respondent shall send a notice of such payment and a copy of the check to:

Regional Hearing Clerk, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Attn: Steven Armsey

2ND OPINION of Level 1 printed in FULL format.

In the Matter of Apex Microtechnology, Inc.

Docket No. EPCRA-09-92-00-07

United States Environmental Protection Agency

1993 EPCRA LEXIS 79

May 7, 1993

HEADNOTE:
[*1] EPCRA: Section 325: Pursuant to Section 325 of EPCRA, 42 U.S.C. @ 11045, a civil penalty in the amount of $ 6,339.90 is assessed for the violation of Section 313, 42 U.S.C. @ 11023 previously found herein.

PANEL:
Henry B. Frazier, III, Chief Administrative Law Judge

COUNSEL:
Ann H. Lyons, Assistant Regional Counsel, U.S. Environmental Protection Agency, Region IX, for the complainant.

Peter G. Schmerl, for the Respondent.

INITIAL DECISION

I. Background - Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision

On November 5, 1992, an Interlocutory Order for Partial Accelerated Decision (Partial Accelerated Decision) was issued in this case. That Order, issued on motion of the U.S. Environmental Protection Agency (EPA, Complainant, or the Agency), found that Apex Microtechnology, Inc. (Respondent, Apex), had violated Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) [a.k.a. Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA)], 42 U.S.C. @ 11023 and the regulations promulgated pursuant thereto, 40 C.F.R. Part 372, as alleged in Counts I and II in the complaint. More particularly, it was found that Respondent [*2] failed to submit to EPA and/or to the State of Arizona, by July 1, 1990 and July 1, 1991, Forms R for the chemical Freon 113 which Respondent used at its facility during calendar years 1989 and 1990 in excess of the established threshold level for reporting such chemical.

II. Background - Processing of the Case and Hearing

On February 2, 1993, a hearing, which had been requested by Respondent, was held in Tucson, Arizona, for the purpose of deciding the sole remaining issue of the amount, if any, of the civil penalty which appropriately should be assessed for the two violations previously found.

In the complaint EPA had proposed a Class II administrative penalty of $ 17,000 for each of the two violations of Section 313 found for a total penalty of $ 34,000. With its prehearing exchange, Complainant submitted a revised proposed civil penalty. The revised proposed penalty was based on the Enforcement Response Policy (ERP) for Section 313 of the Emergency Planning

and Community Right-to-Know Act that was issued by EPA on August 10, 1992. The revised proposed civil penalty based on the August 10, 1992, ERP was $ 9,057, which includes a proposed penalty of $ 5,000 for Count I (failure [*3] to submit by July 1, 1990 the 1989 report) and $ 4,057 for Count II (failure to submit by July 1, 1991 the 1990 report). At the hearing Complainant contended that the $ 9,057 penalty was appropriate; Respondent contended that the proposed penalty was unfair and unreasonable and should be abated or reduced to a nominal amount.

Following the hearing, Complainant and Respondent submitted proposed findings of fact and conclusions of law together with supporting briefs and proposed orders on April 1, 1993, and March 31, 1993, respectively. Reply briefs were filed by Respondent on April 15, 1993 and by Complainant on April 16, 1993.

II. Findings of Fact

In addition to the findings of fact previously made in my Partial Accelerated Decision, and incorporated by reference to the extent not otherwise inconsistent with the findings of fact herein, on the basis of the entire record, including the testimony elicited at the hearing, the exhibits received in evidence and the submissions of the parties, and giving such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, I make the findings of fact which follow. Each matter of controversy [*4] has been determined upon a preponderance of the evidence. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

1. An unannounced EPA inspection of Apex was conducted on March 17, 1992. (Tr. 36-37, 49.)

2. Following the inspection, Apex personnel compiled the required information and prepared Forms R for Freon 113 usage in 1989 and 1990. The forms were signed on March 31, 1992 and were received by EPA on April 6, 1992. (Tr. 12, 43-45.)

3. The Form R for 1989 was due on July 1, 1990; therefore, Apex's Form R for 1989 was more than one year late. (Tr. 16-17; Complainant's Exhibit (Compl. Exh.) 3.)

4. The Form R for 1990 was due on July 1, 1991; therefore, Apex's Form R for 1990 was less than one year late. (Tr. 16-17; Compl. Exh. 3.)

5. Respondent was unaware of the requirement to file a Form R until the EPA inspection was conducted. EPA had not contacted Respondent regarding Form R reporting requirements prior to that time. (Tr. 62-64, 66, 68.)

6. The number of Apex employees which had been reported to Dun [*5] and Bradstreet as of April 1992 was 110. Apex has 125 employees in 1993. (Tr. 16, 61; Compl. Exh. 3.)

7. The gross annual sales of Apex which had been reported to Dun and Bradstreet as of April 1992 were approximately $ 6.5 million. The gross sales of Apex for 1991 was about $ 8.0 million and for 1992, about $ 7.2 million. (Tr. 16, 61; Compl. Exh. 3.)

8. There is no evidence of a history of prior violations of EPCRA by Apex. (Tr. 4, 18.)

9. Respondent had filed reports with the Pima County Air Quality Control District in 1989 and 1991 providing information concerning the annual usage of Freon 113. In contrast to a Form R report, these reports showed the usage in gallons rather than pounds and the reporting periods were from May to June rather than from January through December. (Tr. 52-53; Respondent's Exhibits (Resp. Exhs.) 2, 3.)

10. Respondent was cooperative and responsive during the EPA inspection. (Tr. 43-44; 49-51.)

11. The filing of the required Forms R by Respondent following the inspection was speedy and completely in compliance with EPCRA. (Tr. 44-45, 51-52, 69.)

III. Contentions of the Parties

Complainant contends that Respondent's liability has [*6] been established, and Respondent has not claimed that it is financially unable to pay the proposed penalty. Complainant asserts that it has presented testimony and evidence demonstrating that it correctly and appropriately determined a civil penalty of $ 9,057 and requests an order directing Respondent to pay the proposed penalty.

Respondent admits that it failed to file timely Forms R as required by EPCRA, but maintains that it did, in fact, disclose the equivalent information by filing with Pima County, Arizona, local forms which contained information like that required by Forms R.

Respondent argues that because Complainant has not taken into account all mitigating factors provided for in the ERP and because Respondent, by filing nonconforming forms with the county, met the spirit and intent of Section 313 disclosure requirements, the recommended penalty proposed by Complainant should be abated.

Complainant counters by insisting that Respondent has not provided any defense to the penalty and that the only evidence presented by Respondent was that it had filed some forms with the county environmental agency. Complainant contends that this is not relevant to calculating an appropriate [*7] penalty. There is no discussion in either Section 325 of EPCRA or the ERP of reducing penalties because the violator happens to have complied with other environmental laws.

Although Respondent's witnesses testified that they were unaware of the reporting requirements under Section 313 of EPCRA, Complainant asserts that EPCRA is a strict liability statute, and ignorance of the law is no basis for a defense to the penalty.

Finally, Complainant maintains that EPA's failure to provide Respondent with actual notice of Section 313's filing requirements is not a defense or a basis for reducing the penalty. EPA engages in outreach and attempts to inform companies of their legal requirements through publications, trade associations, seminars and workshops. But not every company will receive this information,

despite the agency's best efforts, and it would severely undermine the EPA's ability to deter future violations of EPCRA to reduce the penalty against Respondent on this basis.

IV. Assessment of Penalty

The Consolidated Rules of Practice provide, in pertinent part, at 40 C.F.R. @ 22.27(b):

(b) Amount of Civil Penalty. If the Presiding Officer determines that a violation [*8] has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

Turning first to the statute, n1 Section 325(c) (1) of EPCRA governs the assessment of civil and administrative penalties for violations of the Section 313 reporting requirements. It permits the Administrator to assess a civil penalty of not more than $ 25,000 per violation. Section 325(c) (3) provides that each day a violation continues constitutes a separate violation for purposes of Section 325(c).

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -

n1 This discussion of the statutory provisions is taken from my initial decision In the Matter of Pease and Curren, Inc., EPCRA-I-90-1008 (March [*9] 13, 1991) slip op. at 9-12.

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - - -

Section 325(c) of EPCRA does not expressly provide criteria to be considered in assessing a penalty for a violation of the reporting requirements of Section 313. However, Section 325(b) sets forth the criteria which must be considered in assessing penalties for violations of the emergency notification requirements under Section 304.

Section 325(b) establishes two types of administrative penalties which may be assessed for a violation of the emergency notification requirements of Section 304 of EPCRA: Class I administrative penalties and Class II administrative penalties. n2

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -

n2 Section 325, 42 U.S.C. @ 11045, provides, in pertinent part:

(b) Civil, administrative and criminal penalties for emergency notification

(1) Class I administrative penalty

(A) A civil penalty of not more than $ 25,000 per violation may be assessed by the Administrator in the case of a violation of the requirements of section

11004 of this title.

* * *

(C) In determining the amount of any penalty assessed pursuant to [*10] this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

(2) Class II administrative penalty

A civil penalty of not more than $ 25,000 per day for each day during which the violation continues may be assessed by the Administrator in the case of a violation of the requirements of section 11004 of this title. . . . Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15.

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - -

Section 325(b)(2) of EPCRA, 42 U.S.C. @ 11045(b)(2), which provides for Class II administrative penalties, requires that civil penalties be assessed in the same manner and subject to the same provisions, as civil penalties are assessed under Section 2615 of Title 15. Section [*11] 2615 of Title 15 governs the assessment of penalties under the Toxic Substances Control Act (TSCA). Section 2615(a)(2)(B) of Title 15 provides that in "determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." (Section 16(a)(2)(B) of TSCA.)

In contrast, Section 325(b)(1)(C) prescribes the following criteria for determining the amount of a Class I penalty: "the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." Thus, the only differences between the criteria which must be considered in assessing Class I and Class II civil penalties under Section 325(b) of EPCRA are that (1) the effect on the ability of the violator to continue [*12] to do business be taken into account for a Class II penalty but not for a Class I penalty, and (2) the economic benefit or savings (if any) resulting from the violation be taken into account for a Class I penalty but not for a Class II penalty.

Since EPCRA itself is silent as to the criteria which should be applied in assessing civil penalties under Section 325(c), the question is whether reference should be made to either or both sets of criteria which are utilized under Section 325(b). The legislative history of EPCRA fails to provide any guidance. It would appear that by setting only a maximum penalty of $ 25,000 for each violation of Section 313, Congress did intend that the penalties which are assessed under Section 325(c) be subject to some degree of discretion. Since Section 304, like Section 313, establishes reporting and notification

requirements, it appears reasonable to conclude that the criteria utilized in assessing penalties under Section 325(b) for violations of Section 304, although not binding, could serve as general guidelines for assessing penalties under Section 325(c) for violations of Section 313.

The penalties in this case are being assessed by an order [*13] made on the record after opportunity for hearing in accordance with Section 554 of the Administrative Procedure Act (APA). Because of the cross-reference to Section 2615 of TSCA found in Section 325(b) (2), Class II penalties for violations of Section 304 of EPCRA are also assessed by an order made on the record after opportunity for a hearing in accordance with Section 554 of the APA. (This is in contrast to Class I penalties which are assessed by EPA through less formal administrative procedures.) Therefore, it would appear reasonable to rely upon the criteria spelled out in Section 2615(a)(2)(B) of TSCA.

The ERP n3 establishes a system for determining penalties in civil administrative actions brought pursuant to Section 313 of EPCRA. A penalty is determined in two stages: (1) determination of a "gravity-based penalty" and (2) adjustments to the gravity-based penalty.

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -n3
Supra, at 3.

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - -

To determine the gravity-based penalty, the "circumstances" of the violation and the "extent" of the violation are considered.

The [*14] circumstance levels of the penalty matrix take into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to states, and to the Federal government. Circumstance levels for failure to report in a timely manner are based upon the "category" of the failure. Form R reports that are submitted one year or more after the July 1 due date are classified as category I, and Form R reports that are submitted after the July 1 due date but before July 1 of the following year are classified as category II. A circumstance level one penalty will be assessed against a category I violation. A "per day" formula is used to determine category II penalties. Therefore, according to the ERP the circumstance level for Count I in this case is "level 1" and for Count II is "level 4" with a "per day" formula to be applied.

The extent level of a violation is based on the number of employees and the gross sales at the time the civil administrative complaint is issued in determining the extent level of a violation. Since Apex used less than ten times the threshold amount n4 of Freon 113 and had less than $ 10 million in total corporate [*15] entity sales and more than 50 employees, the extent level is classified as "level C."

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -n4
Interlocutory Order for Partial Accelerated Decision (November 5, 1992) at 4-5.

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - -

To determine the gravity-based penalty, both the circumstance level and the extent level factors are incorporated into a matrix which establishes the

appropriate gravity-based penalty amount except for those penalties which are calculated on a per day basis.

For Count I the penalty matrix yields a $ 5,000 penalty. For Count II the per day formula yields the following:

$ 1,000 + (280 - 1) ($ 5,000 - $ 1,000) / 365 = Penalty

$ 1,000 + 279 X $ 4,000 / 365 = Penalty

$ 1,000 + $ 1,116,000 / 365 = Penalty

$ 1,000 + $ 3,057 = $ 4,057

Thus, the gravity based penalty for Count II would be $ 4,057.

Having determined the gravity based penalties for Counts I and II, I turn now to the adjustment factors which may be applied to calculate the final penalty. The adjustment factors are:

Voluntary Disclosure

History of prior violation(s)

Delisted chemicals

Attitude [*16]

Other Factors as Justice May Require

Supplemental Environmental Projects

Ability to Pay

There was no voluntary disclosure by Respondent of the violations. The violations were discovered during the inspection; consequently, no adjustment is appropriate. There is no history of prior violations of EPCRA and, hence, no adjustment is appropriate for this factor. (Downward adjustments under this factor are not permitted.) It was not alleged nor was it established that Freon 113 was a delisted chemical and, therefore, no adjustment is called for.

I find that an adjustment in the gravity based penalty is appropriate for Respondent's attitude. The ERP provides that an adjustment of up to 15% may be made for Respondent's cooperation with EPA throughout the "compliance evaluation/enforcement process" and that an additional reduction of up to 15% may be made in consideration of the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance.

Based upon the testimony of EPA's case developer that Respondent had been cooperative and responsive during the EPA inspection and that Respondent was speedy and complete in its compliance [*17] with EPCRA's reporting requirement following the inspection, n5 I conclude that a 15% reduction is appropriate for each of the two components of attitude: cooperation and compliance. In so concluding, I reject Complainant's contention that the attitude adjustment factor may be considered only during settlement

negotiations and may be applied only if Respondent agrees to a settlement without a hearing. Such a restriction would prevent its consideration by the Administrative Law Judge following a hearing. I find no basis in the ERP for such a position.

- - - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - - -n5
Supra, at 5. (Findings of Fact 10 and 11.)

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - - -

There are no grounds upon which an adjustment can be justified under other factors as justice may require. Apex has not offered to make expenditures for supplemental environmental projects, nor has Apex raised inability to pay as a defense in this matter.

There is no basis in the ERP to support a reduction or mitigation of the penalty because other reports were filed with local authorities. Such filings do not constitute [*18] the filing of "invalid Forms R." Clearly Respondent failed to provide EPA with the inventory and disclosure information required by EPCRA. Although Respondent's witnesses testified that Apex was unaware of the reporting requirements under Section 313 of EPCRA, that does not provide a basis upon which to reduce the penalty. Respondent, like everyone else, is charged with knowledge of the United States Code and rules and regulations duly promulgated thereunder. n6 Moreover, Respondent was legally obligated to submit the required Forms R by their due dates regardless of whether it had received any information concerning the EPCRA reporting requirements through EPA's "outreach" efforts. Respondent's arguments seem to constitute a plaintive plea by a relatively small business concerning the burdens of similar reporting requirements imposed by different agencies and levels of government and of the difficulties in trying to become informed as to what those requirements are. Such a plea must be presented in forums other than this adjudicatory proceeding under the Administrative Procedure Act.

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - - -n6
44 U.S.C. [*19] @ 1507. The Supreme Court has said: "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-385 (1947).

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - - -

Therefore, the final penalty calculation is:

Gravity Based Penalty Count I:	$ 5,000.00
Gravity Based Penalty Count II:	$ 4,057.00
Total Gravity Based Penalty:	$ 9,057.00
Adjustment Factor	X .30
Adjustment Amount	$ 2,717.10
	$ 9,057.00
	- 2,717.10
Final Penalty Amount	$ 6,339.90

ORDER n7

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -

n7 Pursuant to 40 C.F.R. @ 22.27(c), this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after the service upon the parties unless an appeal to the Environmental Appeals Board is taken by a party or the Environmental Appeals Board elects to review the initial decision upon its own motion. 40 C.F.R. @ 22.30 sets forth the procedures for [*20] appeal from this initial decision.

- - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - -

Pursuant to Section 325 of EPCRA, 42 U.S.C. @ 11045, a civil penalty in the amount of $ 6,339.90 is assessed against Respondent, Apex Microtechnology, Inc., for the violations of Section 313 of EPCRA.

IT IS ORDERED that Respondent, Apex Microtechnology, Inc., pay a civil penalty to the United States in the sum of $ 6,339.90. Payment shall be made by cashier's or certified check payable to "Treasurer, United States of America." The check shall be sent to:

EPA - Region 9, (Regional Hearing Clerk), P.O. Box 360863M, Pittsburgh, PA 15251

Respondent shall note on the check the docket number specified on the first page of this initial decision. At the time of payment, Respondent shall send a notice of such payment and a copy of the check to:

Regional Hearing Clerk, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Attn: Steven Armsey

68TH OPINION of Level 1 printed in FULL format.

In the Matter of Riverside Furniture Corporation

Docket No. EPCRA-88-H-VI-406S

United States Environmental Protection Agency

1989 EPCRA LEXIS 1

September 28, 1989

HEADNOTE:

[*1] Emergency Planning and Community Right-To-Know Act ("EPCRA")

1. Evidence - The failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law.

Emergency Planning and Community Right-To-Know Act ("EPCRA")

2. Obectives sought by the enactment of EPCRA can be achieved only through voluntary, strict and comprehensive compliance by regulated industry and a lack of such compliance will weaken, if not defeat, the purposes expressed in the Act.

Emergency Planning and Community Right-To-Know Act ("EPCRA")·

3. Civil Penalty Guidelines - Annual report forms filed 115 days late result in an impact on the EPCRA program much less severe than a filing which is 180 days late and the position of the Agency in promulgating guidelines providing that a maximum penalty should be assessed against a regulated industry filing 115 days after July 1, 1988, and 21 days after an EPA inspection, is arbitrary and unreasonable where the only criterion for the assessment of such maximum penalty is the fact of the inspection.

Emergency Planning and Community Right-To-Know Act ("EPCRA")

4. Civil Penalty - It is recognized by [*2] the Act and by EPA that reporting required by EPCRA must be voluntary and timely and that an increased penalty is appropriate where compliance is achieved only after an EPA inspection or other contact.

PANEL:
Marvin E. Jones, Administrative Law Judge

COUNSEL:
Evan L. Pearson, Assistant Regional Counsel, Office of Regional Counsel, U.S. Environmental Protection Agency, Region VI, for the Complainant.

John J. Little, HUGHES & LUCE, for the Respondent.

INITIAL DECISION

On March 27, 1989, an Interlocutory Order was issued herein granting the Motion for Partial Accelerated Decision of the United States Environmental

Protection Agency (hereinafter "EPA", "the Agency" or "Complainant") with the finding that Riverside Furniture Corporation (hereinafter "Riverside" or "Respondent") violated Section 313 of the Emergency Planning and Community Right-To-Know Act (hereinafter "EPCRA" or "the Act"), 42 U.S.C. @ 11023, as charged in subject Complaint, for the reason that Riverside failed to prepare and file "Form R's" on or before July 1, 1988, providing the EPA and the Arkansas Department of Labor information showing the amounts of toxic chemicals used during calendar year 1987, when in fact six toxic chemicals [*3] were used by Riverside for said year in quantities exceeding 10,000 pounds.

On July 26, 1989, a hearing requested by Riverside was convened in Dallas, Texas, to determine the sole/remaining issue of what penalty, if any, should be assessed against Riverside for said violations. EPA proposed civil penalties totaling $ 126,000, calculated pursuant to the Enforcement Policy for said Section 313 (Stipulated Exhibit [hereinafter "SE"] 1). Riverside urges that said penalty amount is excessive and submits it should be reduced for the following reasons:

(1) It did not know about subject reporting requirements which, it is alleged, Congress and EPA knew would take a considerable effort to communicate to the regulated community;

(2) Upon learning of Section 313 requirements, Riverside promptly complied and filed Form R's for its facilities and acted to ensure that it would comply with all EPCRA requirements in the future, and

(3) The penalty proposed is based almost entirely upon a single fact: the inspection of the Riverside facility on September 29, 1988, n1 prior to Respondent filing its Form R's which were prepared on October 20, 1988.

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -

n1 Enforcement Response Policy for Section 313 of the Act (Title III of the Superfund Amendments and Reauthorization Act (hereinafter "SARA"; SE 1), was issued December 2, 1988, and provides, in pertinent part, at page 3, that, to be considered a late report instead of a failure to report for those reports submitted after the deadline of July 1, the report must be submitted prior to the facility being contacted by EPA . . . in preparation for a pending inspection . . . or, in the absence of such contact, prior to the date of . . . inspection. Any report . . . submitted after such contact/inspection is to be treated the same as a non-report in assessing the penalty. Witness Phyllis Flaherty (Transcript [hereinafter "TR"] 12 et seq.), who chaired the work group that developed said Enforcement Response Policy (TR 14), testified (TR 33) that if Riverside had voluntarily filed its Form R's within the 180-day period following the July 1, 1988, deadline (assuming no contact between Riverside and EPA), they would be considered a late reporter (not non-reporter) and the Level 5 Circumstance Level would be used; that for the first three chemicals, the highest Adjustment Level (Level A) would produce a Gravity-Based Penalty [hereinafter "GBP"] of $ 5,000 for each and that the last three chemicals (Level B) would warrant a GBP of $ 3,000 for each chemical (TR 38). The record clearly reflects that the date of subject inspection of Riverside's facility was September 29, 1988, and that Form R's were filed by Riverside on October 20, 1988, and received by EPA on October 24, 1988, and corrected Form R's were dated November 1, 1988 (SE 5, 6, 7, 8, 9 and 10).

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - -
[*4]

On this premise, it submits that the civil penalty imposed should not exceed $ 18,000 and that a more substantial reduction can be justified under the applicable law.

Section 325(c) of EPCRA, 42 U.S.C. @ 11045(c) provides, in pertinent part, that:

(1) Any person . . . who violates any requirement of . . . Section 313 shall be liable to the United States for a civil penalty in an amount not to exceed $ 25,000 for each such violation.

* * *

(3) Each day a violation described in paragraph (1) . . . continues shall, for purposes of this subsection, constitute a separate violation.

40 C.F.R. Section 22.27(b) provides:

If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint (he) shall set forth in the initial decision the specific reasons for [*5] the increase or decrease.

Section 325(b)(C) of the Act adopts the criteria provided in the Toxic Substances Control Act (hereinafter "TSCA") relating to the determination of civil penalties (TR 17-18) which provides, in pertinent part, as follows:

(C) In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation and violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability . . . and such other matters as justice may require.

It is undisputed that Riverside is charged with knowledge of the United States Statutes at Large and that publication in the Federal Register of 40 C.F.R. 372, on February 16, 1988, gave Riverside legal notice of the EPCRA regulations (Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-385 (1947)).

Complainant argues that Riverside's professed lack of actual knowledge is not here relevant for penalty mitigation. However, it further argues that if it be assumed that lack of actual knowledge on the part of Riverside is relevant, then Riverside has the burden of [*6] going forward with evidence to rebut the presumption that it was in possession of such knowledge and that it failed to do so. It submits that knowledge was received by Riverside when, in April and May, 1987, the State of Arkansas prepared and mailed a letter which set forth pertinent requirements of EPCRA. Said letter was mailed to all companies listed in the 1987 Arkansas Manufacturers Directory, including Riverside (Transcript

[hereinafter "TR"] 56-59; Complainant [hereinafter "C"] Exhibit [hereinafter "EX"] 36). Further, in March, 1988, the U.S. EPA mailed a brochure to all companies listed on the TRINET data bases. Riverside was one of the companies included in said mailing (TR 43-46; 50; 74-77; C EX 16, 17 and 18). Because these documents were properly addressed, stamped and placed in the U.S. mail (TR 44-50; 52-57), EPA submits that a presumption is created that Riverside received them, citing 29 Am. Jur. 2d, Evidence, Sec. 194. Riverside's Senior Vice-President (TR 184 et seq.) testified that if something is mailed to 1400 South Sixth Street in Fort Smith, Arkansas, it reaches Riverside, the Respondent (TR 194-195). In addition to the above outreach efforts, EPA conducted [*7] seminars and two national teleconferences all pertaining to the requirements of EPCRA and subject Section 313 (TR 48).

EPA outreach efforts were undertaken with the recognition that to achieve compliance with Section 313 of EPCRA on a broad scale would be difficult and that a lack of compliance would defeat the purposes of said Section 313 of the Act (SE 17, 27 and 29; TR 31). Its broad outreach program on the national, regional and state levels were designed to make the regulated community aware of the requirements of said Section 313 (see also SE 18, 19, 20-25; TR 42-61; 140-144). I find that, for purposes of this case, the success of such outreach efforts must be predicated not on whether Riverside, acting through its employees, had actual knowledge of what requirements of the Act were pertinent to its continued operation but, rather, on whether Riverside should have known of such requirements as a result of such efforts. On this premise, Riverside is charged with actual knowledge. n2

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -

n2 The failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law (Mungin v. Florida East Coast Ry. Co., 318 F. Supp. 720, 737 (DMD Fla., 1970)). Where a corporation has knowledge of information which would trigger a legal duty to act, it cannot escape its responsibility to so act because the particular official charged with the responsibility was unaware of that information (USM v. SPS Technologies, Inc., 514 F.S. 213, 236 (ND IL, 1981)). The knowledge imputed to the corporation does not turn on the actual express knowledge or lack of knowledge of a particular employee. Private corporations are held to have constructive knowledge of its managers and employees; it is considered to have acquired the collective knowledge of its employees (see Camacho v. Bowling, 562 F.S. 1012, 1025 (IL, 1983) and U.S. v. Bank of England, 821 F.2d 844, 856 (1st Cir., 1987)).

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - - -
[*8]

Although Evan Breedlove was in charge of environmental compliance through 1987, he was not produced as a witness, although he authored SE 12 and 14. SE 12 is a letter to Pat Humphrey, Department of Labor, and SE 14 is a letter to the Fort Smith Fire Chief, dated December 4, 1987, submitting material safety data sheets (complying with Section 311 of EPCRA) and acknowledging in response to C EX 36 (letter from State of Arkansas) that such submission was required by the "Hazardous Materials Emergency Response Commission."

Breedlove was responsible for environmental matters at Riverside (TR 164) until such duties gradually became the responsibility of witness Gary Craig,

whose job responsibilities are now described as director of safety, fire protection, environmental affairs and security (TR 160). Prior to September 29, 1988, Riverside did not belong to professional and civic organizations (TR 161), but joined American Furniture Manufacturers Association, Water and Air Users and other organizations after said date, upon learning that such memberships are a means of keeping abreast of regulatory requirements (TR 162; 171).

Riverside Furniture Corporation employs between 1300 and [*9] 1400 people (TR 176). The sole responsibility for environmental matters, over the past 18 months, has been that of Gary Craig (TR 180). He works with Evan Breedlove. Craig stated (TR 181) that he doesn't have time to read all the magazines and trade journals that come to him, because of his many duties at Riverside. He opined that if a magazine came across his desk with an article concerning subject Title III that he wouldn't consider it notice of the requirements of Title III if he hadn't read it (TR 182).

From the foregoing, I conclude that Riverside Furniture Corporation did not have actual knowledge, on July 1, 1988, and until after September 29, 1988, of the requirements set forth in the pertinent regulations and the Act; however, it is apparent that Riverside should have had such knowledge. On this record, I do not attribute the "lack of knowledge" to insufficient outreach efforts of the state and EPA but to an inefficient effort on the part of Riverside to keep abreast of requirements of subject Act and regulations, apparently due to its failure to have an adequate staff.

Such finding is not determinative, however, of the issue here considered. The basic requirement [*10] of the Act expressed in subject Section 313(a), 42 U.S.C. @ 11023(a), provides that ". . . a facility subject to (subject) requirements shall complete a (Form R) for (subject toxic chemicals) . . . otherwise used in quantities exceeding the . . . threshold quantity . . . during the preceding calendar year at such facility. Such form shall be submitted . . . on or before July 1, 1988 and annually thereafter . . ."

Section 325(c), 42 U.S.C. @ 11045(c) then provides that any person who violates said Section 313 shall be liable for a civil penalty not to exceed $ 25,000.

The civil penalty policy is derived from the provisions of @ 325(b)(C), quoted supra, page 5, whereby a gravity-based penalty (hereinafter "GBP") for each violation is ascertained from a matrix containing, on its vertical axis, six "Circumstance Levels" - Levels 1 through 6 - and, on its horizontal axis, three Adjustment Levels - A, B and C.

As explained in footnote 1, page 4, supra, the guidelines provide that, to be considered a late report instead of a failure to report, for those reports submitted after the deadline of July 1, 1988, the report must be submitted prior to the facility being contacted by EPA, and [*11] that any report submitted after such contact (or inspection) is to be "treated the same as a non-report in assessing the penalty." It is agreed that Riverside is a "large" company and that it "uses", for three of subject toxic chemicals, ten times or more chemical than the threshold limit (Adjustment level A) and, for the other three toxic chemicals, it "uses" less than then times the threshold. For the reason that on the date of the inspection, performed on September 29, 1988, Riverside had not filed Form R's for said chemicals, the remedial action (filing said Form R's) taken thereafter is considered a non-report, although filed on October 20,

1988, and received by EPA on October 24, 1988. For the reasons hereinafter set forth, I find that the guidelines are impractical in application and produce a resultant civil penalty incommensurate with the facts presented by the record.

One of the purposes of EPCRA is to enable EPA, and state and local governments, to gather information regarding the usage of various toxic chemicals by industry. Section 313 of the Act specifically was intended to obtain information regarding releases of toxic chemicals into the environment (TR 128-129). [*12] Annual reports of such chemical releases (Form R's) are required from specified facilities where the release exceeds a specified threshold amount. Such reports were required for the first time on July 1, 1988 (for releases occurring during calendar year 1987) and annually thereafter (@ 313).

It needs no citation of authority to state that the filing of such reports was intended, in this as in other programs, to be timely, complete and accurate. The success of EPCRA can be attained only through voluntary, strict and comprehensive compliance with the Act and regulations which recognize that achievement of such compliance would be difficult and that a lack of compliance would weaken, if not defeat, the purposes expressed (SE 17, 27, 29; TR 31). Congress provided for "threshold amounts" that effectively increased the number of facilities required to submit Form Rs. EPA engaged in its outreach efforts as a means of making the regulated community aware of applicable requirements of the Act. In formulating its Enforcement Policy (SE 1), dated December 2, 1988, EPA required that Form R's be submitted on July 1, 1988; however, it further provided that such reports could be submitted [*13] up to 90 days after July 1, 1988, without penalty (TR 30-31; SE 1, page 11).

I find that, on this record, the EPCRA program must require voluntary n3 and timely compliance with the Act and regulations to succeed in attaining the objective envisioned by the Act: having available information for the government and the public reflecting the location, character and quantities of toxic chemicals released by industry into and onto air, water and land. The Act and regulations provide for a date certain for the initial filing of Form R's; however, in recognition of difficulties in making the regulated community aware of the provisions of subject regulation, the guidelines for the assessment of civil penalties provided, in the interest of assuring that such penalties are arrived at in a fair, uniform and consistent manner, that certain "late filings" would be tolerated. A 30-day delay, to August 1, 1988, is found to have minimal impact on the Agency's ability to make such information available to the public due to the "amount of time to input the data into the tracking system and data base", and requires no enforcement action. A Notice of Non-compliance is appropriate for late reports [*14] submitted with 31-90 days after July 1, 1988. The "grace period" is less in subsequent years. This provision is in deference to the start-up of a new and innovative law which requires (Form R's) from facilities which previously have not been required to report, and recognizes that reports submitted in this time frame will have less unfavorable impact on availability of said data.

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -

n3 As stated in City of Detroit (consolidated cases), TSCA-V-C-82-87 et al., 1.c. 29, citing Western Compliance Services, TSCA-1087-11-01-2615 (EPA Region X): "If no sanctions were provided for failure to prepare such document unless and until an inspection, there would exist no incentive to comply with the

regulation and the public would not be protected as by the Act intended."

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - -

In the instant case, the inspection was performed by EPA on September 29, 1988, 91 days after July 1, 1988, when Riverside's Form R's should have been filed. Because of the inspection (contact), the Form R's filed by are, under the guidelines, considered a "non-filing" [*15] instead of a "late filing".

It will be noted that Circumstance Level 5 is applicable to "Late Reporting" (91-180 days after the due date for 1988 reports). (See footnote 1, page 4, supra; SE 1, page 11.)

The Act's requirement and the Agency's recognition that specified reporting be voluntary and timely must be vindicated; however, it is further clear that an evaluation of the impact on the program of any non-compliance is pertinent as demonstrated, supra. It is clear, and I find, that Riverside's prompt and voluntary filing of its Form R's, received by EPA on October 24, 1988 (115 days late), was consistent with the objective of the Act and the unfavorable impact on the EPCRA program was discernably less than had Riverside taken 180 days or more to file said reports. Under the guidelines, once the contact with Riverside was made by EPA, any report filed thereafter is considered to be a "failure to report". I find that such disposition is arbitrary and opposed to the expressed interest in arriving at civil penalties in a fair, uniform and consistent manner. I have further considered that the charge here made is a failure to report in 1988 (at the initiation of subject enforcement [*16] effort), and actually prior to promulgation of the Enforcement Response Policy on December 2, 1988.

In the premises, I adopt Circumstance Level 3 of subject matrix (SE 1, page 9) and find that penalties totaling $ 75,000 should be assessed against Riverside, and recommend entry of the following ORDER:

FINAL ORDER n4

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

n4 40 C.F.R. @ 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its Service upon the parties, unless an appeal is taken by one of the parties or the Administrator elects to review the Initial Decision. Section 22.30(a) provides for an appeal from this Initial Decision within 20 days.

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - -

1. Pursuant to Section 325(c) of EPCRA, 42 U.S.C. @ 11045(c), a civil penalty in the total amount of $ 75,000 is assessed against Riverside Furniture Corporation for the violations of the Act as established by the evidence elicited herein.

2. Payment of $ 75,000, the civil penalty assessed, shall be made within 60 days after receipt of the FINAL ORDER [*17] by forwarding a Cashier's or Certified Check, made payable to the Treasurer, United States of America, to:

EPA - Region 6

(Regional Hearing Clerk)
P.O. Box 360582M
Pittsburgh, PA 15251.

ROBERT D. WYATT
EILEEN M. NOTTOLI
BEVERIDGE & DIAMOND
One Sansome Street, Suite 3400
San Francisco, CA 94104-4438
Telephone: (415) 397-0100

Attorneys for Respondent
Catalina Yachts, Inc.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

In the matter of:	Case No. EPCRA 09-94-0015
Catalina Yachts, Inc.,	MOTION TO STRIKE AND FOR ACCELERATED DECISION
Respondent.	

Respondent Catalina Yachts, Inc. ("Catalina") moves the Presiding Administrative Law Judge pursuant to 40 CFR § 22.16 to strike 1) the verified statements of Gregory A. Gholson and Amy C. Miller; and 2) portions of the verified statement of Pi-Yun Tsai for the reasons set forth below and in the attached declaration of Eileen M. Nottoli. These verified statements were served on Respondent by Complainant at 17:58 PST on January 22, 1996, three working days before the administrative hearing on this matter.

Respondent also moves the Presiding Administrative Law Judge for an accelerated decision pursuant to 40 CFR § 22.20.

1. The reasons supporting the motion to strike the verified statements of Gregory A. Gholson ("Gholson") and Amy C. Miller ("Miller") are as follows. First, neither the Gholson nor the Miller statement was disclosed in Complainant's Prehearing Exchange dated March 10, 1995 or the modified Prehearing Exchange dated November 4, 1996. Second, the contents of neither the Gholson nor Miller statements were disclosed in Complainant's Prehearing Exchange dated

March 10, 1995 or the modified Prehearing Exchange dated November 4, 1996. Third, neither the Gholson nor Miller statement was disclosed by Complainant in the conference call concerning whether a written verified statement could be submitted by EPA which call took place at 11:00 PST on January 22, 1997. Fourth, the contents of neither the Gholson nor Miller statements are relevant to the issue of whether penalties are appropriate in this case and, if so, the proper amount of such penalties.

2. The following portions of the verified statement of Pi-Yun Tsai ("Tsai") should be stricken because these portions were neither disclosed in the March 10, 1995 Prehearing Exchange nor in the November 4, 1996 Modified Prehearing Exchange. Moreover, neither the issue of the relative toxicity nor the chemical or physical properties of acetone or styrene nor discussions between EPA and the Los Angeles Fire Department concerning alleged events are relevant to the issue of whether penalties are appropriate in this case and, if so, the proper amount of such penalties:

(i) All of Paragraph 1 and Exhibit 1;

(ii) All of Paragraph 3;

(iii) All of Paragraph 4;

(iv) All of Paragraph 13 except the first sentence;

(v) All of Paragraph 14 except the first sentence;

(vi) All of Paragraph 15 except the first sentence.

Dated: January 23, 1997

BEVERIDGE & DIAMOND

By: _____

Eileen M. Nottoli
Attorneys for Respondent

S:\CLI\14\00\3433\PLG\3433emn.12f

ROBERT D. WYATT
EILEEN M. NOTTOLI
BEVERIDGE & DIAMOND
One Sansome Street, Suite 3400
San Francisco, CA 94104-4438
Telephone: (415) 397-0100

Attorneys for Respondent
Catalina Yachts, Inc.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

In the matter of:	Case No. EPCRA 09-94-0015
Catalina Yachts, Inc.,	DECLARATION OF EILEEN M. NOTTOLI
Respondent.	

I, Eileen M. Nottoli do declare as follows:

1. I am a Senior Attorney with the law firm of Beveridge & Diamond. The following facts are within my personal knowledge and if called as a witness I could competently testify with respect thereto.

2. The issue of the relative toxicity of acetone and styrene is irrelevant to the determination of whether penalties are appropriate for this matter and, if so, the appropriate amount of such penalties. Moreover, Complainant EPA had not raised this issue previously in its March 10, 1995 Prehearing Exchange or its November 4, 1996 Modified Prehearing Exchange and Complainant did not disclose this issue in the conference call held with the Court at 11:00 PST on January 22, 1997.

3. The issue of the location of the Hilton Hotel is irrelevant to the determination of whether penalties are appropriate for this matter and, if so, the appropriate amount of such penalties. Moreover, Complainant EPA had not raised this issue previously in its March 10, 1995

Prehearing Exchange or its November 4, 1996 Modified Prehearing Exchange and Complainant did not disclose this issue in the conference call held with the Court at 11:00 PST on January 22, 1997.

4. Discussions between EPA and the Los Angeles Fire Department concerning four alleged events at Respondent's facility are not relevant to the determination of whether penalties are appropriate for this matter and, if so, the appropriate amount of such penalties. Moreover, Complainant EPA had not raised this issue previously in its March 10, 1995 Prehearing Exchange or its November 4, 1996 Modified Prehearing Exchange and Complainant did not disclose this issue in the conference call held with the Court at 11:00 PST on January 22, 1997.

5. The administrative hearing for this matter is scheduled for January 29, 1997 and it is essential that Respondent know the appropriate scope of its defense. As stated heretofore, these issues had not been raised before 17:58 PST on January 22, 1997, three working days before the hearing. Because these issues are neither relevant nor timely raised by Complainant, Respondent should not be called upon to address them.

I declare under penalty of perjury in accordance with the laws of the State of California that the above declaration is true and correct. Executed at San Francisco, California on this 23rd day of January 1997.

Eileen M. Nottoli

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing MOTION TO STRIKE AND FOR ACCELERATED DECISION and DECLARATION OF EILEEN M. NOTTOLI was hand delivered to the Regional Hearing Clerk, United States Environmental Protection Agency, Region 9, attempts to transmit by facsimile to Spencer T. Nissen from approximately 15:00 - 16:00 at (202) 260-3720 were unsuccessful and that a copy was sent by Federal Express to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, S.W., Room 3706 (A-110)
Washington, D.C. 20460

and by hand delivery to:

David M. Jones, Esq.
Assistant Regional Counsel
United States Environmental Protection
Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Date: January 23, 1997

Debbie Harris

Robert D. Wyatt, Esq.
Eileen M. Nottoli, Esq.
BEVERIDGE & DIAMOND
One Sansome Street
Suite No. 3400
San Francisco, California 94104

Attorneys for Respondent
Catalina Yachts, Inc.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

In the matter of:	Docket No. EPCRA 09-94-0015
CATALINA YACHTS, INC.	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO COMPLAINANT'S MOTION FOR PRODUCTION OF TAX RETURNS

Respondent Catalina Yachts, Inc. opposes Complainant United States Environmental Protection Agency, Region 9's, ("EPA Region 9") motion for production of Respondent's five most recent Federal Income Tax Returns upon the following points and authorities.

PRELIMINARY STATEMENT

This case is now set for hearing on May 14, 1996 on the issue of the appropriateness of EPA Region 9's proposed penalty of $175,000 for seven alleged violations of EPCRA subsection 325(c) reporting requirements. Complainant has already been provided with a sworn declaration from Respondent's accountant as to Catalina's financial status for the relevant years in the

pre-hearing exchange conducted in March of 1995, and moreover, Complainant itself has produced a Dun & Bradstreet report on Catalina's financial status. Hence, Complainant's motion is burdensome, duplicative and without merit. It should be denied.

ARGUMENT

As the sole grounds for its motion, EPA Region 9 cites In Re: New Waterbury, Ltd. (1994), TSCA Appeal No. 93-2, decided October 20, 1994. That case is not on point for at least three reasons. First, the case does not speak to alleged violations of EPCRA. Second, even if one were to analogize the holding and reasoning of the Environmental Appeals Board regarding Complainant's burden of proof under TSCA to cases arising under EPCRA, such analogies would be limited to alleged violations of EPCRA subsection 325(b) cases (42 USC 11045(b)) but not EPCRA subsection 325(c) cases, such as the instant case. That is because both TSCA and EPCRA subsection 325(b) expressly require the Administrator to take into account, *inter alia*, "ability to pay" in determining "any penalty assessed pursuant to this subsection...", whereas subsection 325(c) contains no such directive. Finally, Respondent has not asserted "ability to pay" as a defense to the proposed penalty, but rather has submitted evidence of its financial condition during the relevant time frame as one of several compelling factors which argue for no penalty or a *de minimus* penalty.

///

///

For all of the foregoing reasons, Complainant's motion should be denied.

Dated: March 15, 1996

Respectfully submitted,

BEVERIDGE & DIAMOND

By: _____
Robert D. Wyatt
Attorneys for Respondent
Catalina Yachts, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Memorandum of Points and Authorities in Opposition to Complainant's Motion for Production of Tax Returns was filed with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 9, and that a copy was sent by First Class Mail to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental
Protection Agency
401 M Street, S.W., Room 3706 (1900)
Washington, D.C. 20460

and to:

David M. Jones, Esq.
Assistant Regional Counsel
United States Environmental Protection
Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Date: March 15, 1996

Helen Abraham

Robert D. Wyatt, Esq.
Eileen M. Nottoli, Esq.
BEVERIDGE & DIAMOND
One Sansome Street
Suite No. 3400
San Francisco, California 94104

Attorneys for Respondent
Catalina Yachts, Inc.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

In the matter of:	Docket No. EPCRA 09-94-0015
CATALINA YACHTS, INC.	DECLARATION OF RICHARD S. PEPIAK
Respondent	

DECLARATION

I, Richard S. Pepiak, do declare as follows:

1. Since 1989, I have been employed as a Sales Representative for M.A.Hanna Resin ("Hanna"). One of my accounts is Catalina Yachts, Inc. ("Catalina"). The following facts are within my personal knowledge and if called as a witness I could competently testify with respect thereto.

2. In 1991, I was asked by Catalina to supply an acetone replacement for use at Catalina's plant located at 21200 Victory Boulevard, Woodland Hills, California.

3. Hanna supplies DBE, an acetone substitute. To my knowledge, no other Southern California boat manufacturer had

made use of a substitute for acetone prior to Catalina's adoption of DBE in 1991.

4. DBE is more expensive than acetone, but use of DBE results in reduced emissions of volatile organic compounds.

5. I worked with Gerard Douglas in Catalina's evaluation of DBE. In addition, to promote waste reduction, Catalina purchased a DBE solvent recovery system which extends the useful service life of DBE. The cost of this recovery system was approximately $30,000.

6. Catalina's successful use of DBE as an acetone replacement has allowed Hanna to promote additional sales of DBE to other customers.

7. Attached hereto as Exhibit A is a true and correct letter that I sent to Gerard Douglas at Catalina, and the facts stated therein are true of my own personal knowledge and belief.

I declare under penalty of perjury in accordance with the laws of the State of California that the above declaration is true and correct. Executed at Rancho Cucamonga, California this 10th day of March 1995.

DATED: March 10, 1995

By: _____
Richard S. Pepiak

Robert D. Wyatt, Esq.
Eileen M. Nottoli, Esq.
BEVERIDGE & DIAMOND
One Sansome Street
Suite No. 3400
San Francisco, California 94104

Attorneys for Respondent
Catalina Yachts, Inc.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

In the matter of:	Docket No. EPCRA 09-94-0015
CATALINA YACHTS, INC.	DECLARATION OF RICHARD SIROTT
Respondent	

DECLARATION

I, Richard Sirott, do declare as follows:

1. I am a Certified Public Accountant and am duly licensed in the State of California. Since 1975, I have owned Sirott Accountancy Corporation.

2. Since 1990, I have compiled financial statements and prepared tax returns for Catalina Yachts, Inc. ("Catalina"). I am familiar with Catalina's operating profits and losses during the time period 1990-1993.

3. As reflected on financial statements prepared by another accountant, Catalina had a profit of approximately $227,000 in 1988 based on sales of approximately $52,761,769.

From 1989-1993, Catalina had accumulated operating losses of approximately $4,457,530.

I declare under penalty of perjury in accordance with the laws of the State of California that the above declaration is true and correct. Executed at Woodland Hills, California this 10th day of March 1995.

DATED: March 10, 1995

By: _____
Richard Sirott, CPA

n:\all\1400\3400\DEC.DOU

CERTIFICATE OF SERVICE

In the matter of CATALINA YACHTS, INC.
Docket No. EPCRA 09-94-0015

I hereby certify that copies of the DECLARATION OF RICHARD S. PEPIAK and DECLARATION OF RICHARD SIROTT, with original signatures thereon, were mailed via regular mail with postage prepaid thereon on March 20, 1995 to the following:

Regional Hearing Clerk
United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

and copies of said documents to the following:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, S.W., Room 3706 (A-110)
Washington, D.C. 20460

David M. Jones, Esq.
Office of Regional Counsel, RC-2-1
United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

Date: March 20, 1995

Helen Abraham
BEVERIDGE & DIAMOND

Robert D. Wyatt, Esq.
Eileen M. Nottoli, Esq.
BEVERIDGE & DIAMOND
One Sansome Street
Suite No. 3400
San Francisco, California 94104

Attorneys for Respondent
Catalina Yachts, Inc.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

In the matter of:	Docket No. EPCRA 09-94-0015
CATALINA YACHTS, INC.	OPPOSITION TO MOTION TO STRIKE OPPOSITION TO MOTION FOR ACCELERATED DECISION

Catalina Yachts, Inc. ("Catalina") responds to the United States Environmental Protection Agency Region 9's ("EPA") Motion to Strike Motion for Accelerated Decision as follows. Catalina also renews its request that the court either dismiss this action, determine liability with no civil penalty, or set a hearing as soon as possible to determine an appropriate civil penalty.

FACTS

On June 20, 1994, EPA filed a Complaint and Notice of Opportunity for Hearing ("Complaint") against Catalina for alleged failures to file a total of seven Form R reports for

1988-92. EPA sought the maximum penalty of $25,000 for each alleged reporting violation for a total of $175,000.

On July 14, 1994, Catalina filed its Answer to Civil Complaint ("Answer"). Catalina admitted that it used acetone and styrene during the relevant time period. However, Catalina answered that it was unable to respond to the remaining allegations of the Complaint at that time because Catalina had not finished reviewing its records. Accordingly, Catalina denied the remaining allegations and reserved the right to amend its Answer at a later date.

On October 4, 1994, EPA filed a Motion for Accelerated Decision based on EPA's contention that there were no material facts with respect to liability to be decided by a hearing.

Catalina filed its Opposition to Motion for Accelerated Decision on October 19, 1994 and requested that the court either dismiss this action, determine liability with no civil penalty, or set a hearing as soon as possible to determine an appropriate civil penalty. In its Opposition, Catalina conceded that no Form R reports had been filed but submitted copies of documents that had been filed with local government agencies that contained comparable information to that required in the Form R reports, and described public outreach programs conducted by Catalina in its community. Catalina was innovative in finding a substitute for acetone, a substance that was recently determined by EPA not to require

reporting under Section 313. Catalina's lack of awareness of an obligation to file Form R reports did not harm human health or the environment and was, at worst, an administrative error.

In an effort to move this case forward in an efficient and expedited matter, Catalina's Opposition also sought relief from the civil penalties, if any, for this administrative error. EPA has sought the maximum penalty of $25,000 for each of the seven alleged violations for a total penalty of $175,000. In doing so, Catalina's Opposition also referred to an informal settlement with EPA at which EPA staff stated that they were bound to adhere strictly to the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right to Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990)" (referred to herein as the "EPA Penalty Policy"). Consequently, EPA staff informed Catalina that, under the EPA Penalty Policy, the proposed penalty for each alleged violation was $25,000 and that EPA staff had no discretion to further adjust the penalty beyond the 30% provided in the penalty policy.

EPA has now filed a Motion to Strike Opposition to Motion for Accelerated Decision ("Motion to Strike") on November 10, 1994. The Motion to Strike seeks to strike all portions of Catalina's Opposition to Motion for Accelerated Decision which refer to the EPA staff discussions on the limits of their discretion in settling cases and the requirement that they strictly adhere to the EPA penalty policy.

ARGUMENT

EPA's Motion to Strike is inappropriate for the following reasons:

First, a Motion to Strike is an appropriate response to a pleading, Fed. Rule Civ. Proc. 12(f), and a pleading is a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third party complaint or a third party answer. Fed. Rule Civ. Proc. 7(a). EPA did not file a motion to strike a pleading; rather, it filed a motion to strike Catalina's brief in Opposition to Motion for Accelerated Decision, which is not a pleading. Consequently, EPA's Motion to Strike is not appropriate.

More importantly, EPA based its Motion to Strike references to EPA staff statements that they must strictly adhere to the EPA Penalty Policy, and cannot exercise discretion, upon Fed. Rule of Evidence 408 (referred to herein as "Rule 408"). Rule 408 provides that evidence of compromising or attempting to compromise a claim is not admissible to prove liability for or invalidity of the claim or the amount. Significantly, Rule 408 "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." Rule 408. See In the Matter of Western Compliance Services, Inc., TSCA Docket 1087-11-01-26 (February 10, 1989), 1989 WL 252617 (E.P.A.).

The statements by EPA staff that they are bound to strictly adhere to the EPA Penalty Policy and cannot exercise discretion are used in Catalina's Opposition to Motion for Accelerated Decision and were not offered to prove a compromise of a claim. Rather, they were offered to prove that the EPA Penalty Policy is being treated by EPA staff as a binding rule of substantive law. However, under the rule set forth in McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C.Cir., 1988), in order to obtain the status asserted by EPA staff the Penalty Policy must comply with the notice and comment requirements of the Administrative Procedures Act ("APA), 5 U.S.C. § 553. This the agency has not done. The EPA Penalty Policy was not published in the Federal Register for notice and comment and subsequent adoption in accordance with the APA. Consequently, the EPA Penalty Policy is not binding on this court, but is merely advisory of the agency's position. Given this impasse, Catalina has sought through its Opposition to obtain relief from this court. Although Catalina might have fashioned its request in a different form, in Catalina's view the question is one of form over substance, and Catalina herein requests that the court grant appropriate relief.

RELIEF REQUESTED

Based on the above, Catalina requests that the court deny EPA's Motion to Strike. Under the facts as set forth in its Opposition to Motion for Accelerated Decision, Catalina renews its request that the court either dismiss this action,

determine liability with an award of no civil penalty, or set a hearing as soon as possible to determine the appropriate civil penalty based on the evidence of Catalina's substantive compliance with the requirements to inform the community of Catalina's use of acetone and styrene and the absence of evidence of harm to human health or the environment.

DATE: December 2, 1994 BEVERIDGE & DIAMOND

By: Eileen M. Nottoli by RDW
Eileen M. Nottoli
Attorneys for
CATALINA YACHTS, INC.

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Opposition to Motion to Strike Opposition to Motion for Accelerated Decision was filed with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 9, and that a copy was sent by First Class Mail to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, S.W., Room 3706 (A-110)
Washington, D.C. 20460

and to:

David M. Jones, Esq.
Office of Regional Counsel RC-2-1
United States Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, CA 94105

Date: December 2, 1994

Helen Abraham

Robert D. Wyatt, Esq.
BEVERIDGE & DIAMOND
One Sansome Street
Suite No. 3400
San Francisco, California 94104

Attorneys for Respondent
Catalina Yachts, Inc.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

In the matter of:	Docket No. EPCRA 09-94-0015
CATALINA YACHTS, INC.	ANSWER TO CIVIL COMPLAINT
Respondent	

ANSWER

1. Answering Paragraphs 1-11 of the Complaint, Respondent Catalina Yachts, Inc. ("Respondent") admits that (i) it is a "person" as that term is defined by 42 U.S.C. § 11049(7); (ii) it is the "owner or operator" of its plant located at 21200 Victory Boulevard, Woodland Hills, California; (iii) its Woodland Hills plant is a "facility" as that term is defined at 42 U.S.C. § 11049(4); (iv) the Standard Industrial Classification ("SIC") Code for its Woodland Hills plant is 3732; and (v) it employs more than 10 "full-time employees" as that term is defined at 40 C.F.R. § 372.3. Respondent is continuing to review its records and is at the present time unable to respond to the remaining allegations in Paragraphs

1-11 of the Complaint and, therefore, denies each and every remaining allegation. Respondent reserves the right to amend its Answer when it completes its review.

COUNT I

2. Answering Paragraphs 12-16 of the Complaint, Respondent admits that it used acetone as a cleaning agent in its manufacturing operations during calendar year 1988. Respondent is continuing to review its records and is at the present time unable to respond to the remaining allegations in Paragraphs 12-16 of the Complaint and, therefore, denies each and every remaining allegation. Respondent reserves the right to amend its Answer when it completes its review.

COUNT II

3. Answering Paragraphs 17-21, Respondent admits that it used acetone as a cleaning agent in its manufacturing operations during calendar year 1989. Respondent is continuing to review its records and is at the present time unable to respond to the remaining allegations in Paragraphs 17-21 of the Complaint and, therefore, denies each and every remaining allegation. Respondent reserves the right to amend its Answer when it completes its review.

COUNT III

4. Answering Paragraphs 22-26 of the Complaint, Respondent admits that it processed products which contained styrene during calendar year 1988. Respondent is continuing to review its records and is at the present time unable to respond to the remaining allegations in Paragraphs 22-26 of the

Complaint and, therefore, denies each and every remaining allegation. Respondent reserves the right to amend its Answer when it completes its review.

COUNT IV

5. Answering Paragraphs 27-31 of the Complaint, Respondent admits that it processed products which contained styrene during calendar year 1989. Respondent is continuing to review its records and is at the present time unable to respond to the remaining allegations in Paragraphs 27-31 of the Complaint and, therefore, denies each and every remaining allegation. Respondent reserves the right to amend its Answer when it completes its review.

COUNT V

6. Answering Paragraphs 32-36 of the Complaint, Respondent admits that it processed products which contained styrene during calendar year 1990. Respondent is continuing to review its records and is at the present time unable to respond to the remaining allegations in Paragraphs 32-36 of the Complaint and, therefore, denies each and every remaining allegation. Respondent reserves the right to amend its Answer when it completes its review.

COUNT VI

7. Answering Paragraphs 37-42 of the Complaint, Respondent admits that it processed products which contained styrene during calendar year 1991. Respondent is continuing to review its records and is at the present time unable to respond

to the remaining allegations in Paragraphs 37-41 of the Complaint and, therefore, denies each and every remaining allegation. Respondent reserves the right to amend its Answer when it completes its review.

COUNT VII

8. Answering Paragraphs 42-46 of the Complaint, Respondent admits that it processed products which contained styrene during calendar year 1992. Respondent is continuing to review its records and is at the present time unable to respond to the remaining allegations in Paragraphs 42-46 of the Complaint and, therefore, denies each and every remaining allegation. Respondent reserves the right to amend its Answer when it completes its review.

RELIEF REQUESTED

9. Respondent hereby requests a hearing to contest the allegations in the Complaint and the proposed penalties for the alleged violation.

DATED: July 14, 1994

BEVERIDGE & DIAMOND

By: _____
Robert D. Wyatt
Attorneys for
CATALINA YACHTS, INC.

i:\user\emn\wp\answer

PROOF OF SERVICE

I, Helen Abraham, declare that I am over the age of eighteen years and not a party to the within action. I am employed in San Francisco, California and my business address is One Sansome Street, Suite 3400, San Francisco, California. I am readily familiar with the business practice at my place of business for the collection and processing of correspondence for hand delivery by messenger and/or by mailing with the United States Postal Service. On the date set forth below, the following document:

ANSWER TO CIVIL COMPLAINT

was placed for service in a sealed envelope to be delivered by messenger with postage prepaid and addressed to:

Regional Hearing Clerk
United States Environmental Protection Agency
Region IX, RC-1
75 Hawthorne Street
San Francisco, CA 94105

David M. Jones, Esq.
Office of Regional Counsel RC-2-1
United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

and said envelope was hand-delivered by messenger following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 14, 1994, at San Francisco, California.

Helen Abraham